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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 42

Family Law

FAMILY PROPERTY LAW

26 October 1971

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THE LAW COMMISSION

SECOND PROGRAMME - ITEM XIX

FAMILY LAW

PUBLISHED WORKING PAPER NO. 42

FAMILY PROPERTY LAW

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FAMILY PROPERTY LAW

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GENERAL INTRODUCTION

Some preliminary remarks

0.1 There is really no such thing in English law as "family property". We have a very elaborate law of property, but the family, though a social unit of great importance and recognised as such by the law, is not an entity that is given rights or even defined: it has failed to attract rights and duties comparable with those of an individual human being, a company, or a partnership. And so it is not surprising that English "family property law" is hardly more than a label given to the hesitant moves made by Parliament during the last hundred years to eliminate the grosser injustices inflicted by the common law upon married women in property matters.

0.2 The purpose of the Paper is to consider whether a genuine law of family property should be introduced into our law, and to indicate, albeit provisionally, some ways in which this might be done. One point is clear - and of crucial importance. The job of reform, if it is to be done, can only be done by legislation: the judges, however great their ingenuity and zeal for reform, cannot by judicial decision alone make the changes of legal policy that are needed.[1]

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1. A study of some recent decisions illustrates their difficulties: see, in particular, Pettitt v. Pettitt [1970] A.C. 777 (H.L.); Gissing v. Gissing [1970] 3 W.L.R. 255 (H.L.).

0.3 Progress towards a fairer distribution of property among the members of a family in the event of marriage breakdown was made in 1970 by the Matrimonial Proceedings and Property Act of that year.[2] While primarily designed to regulate the provision of financial support for the economically weaker members of the family when faced with a decree of divorce, nullity or judicial separation, it went substantially further. It made all the property of a husband (or a wife) available for the support of members of the family in need of such support; it conferred upon the court power to transfer property from husband (or wife) to wife (or husband) and from either parent to children; and it called upon the courts in the exercise of their extensive powers of property distribution to have regard to the contribution made by husband and wife to the welfare of the family

> "including any contribution made by looking after the home or caring for the family."[3]

But the scope of the statute is limited. First, it applies only to situations of marriage breakdown - i.e. divorce, nullity, judicial separation, failure to maintain. Secondly, it is not, strictly speaking, a property statute: it does not alter the legal rules which determine the ownership of property. For instance, it does not declare that a wife's contribution by looking after the home confers upon her a right of property in the assets of the family: it is confined to empowering a court in certain circumstances to have regard to her contribution in deciding whether or not to transfer to her some or any part of her husband's property - or to make one or more of the financial orders

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2. The Act was largely based on Law Com. No.25, 1969, Report on Financial Provision in Matrimonial Proceedings.

3. s.5(1)(f).

available under the Act. In the Paper we consider whether a wife (or husband) or child should enjoy rights of property in the assets of the family as distinct from being offered the opportunity to apply for an order of the court.

0.4 This is a field in which it is all too easy to beg questions; for example, it does not follow that because "family property" is a subject requiring study there is a need to introduce radical changes into our law of property. A case for reform has to be made out, and certain fundamental questions answered. These include the following: should a wife (or husband or child) have a property right, or only the opportunity to apply to the court? If she should, what should be its extent and character, when should it arise, and how should it be made available? Is it to arise before the end of the marriage - whether by breakdown or death? Should the law, so far as property rights are concerned, discriminate between marriages ended by separation and those ended by death? Should the surviving spouse (or child) have rights of inheritance in the dead spouse's estate which the will cannot destroy?

0.5 "Property" is a vague term - having as many meanings as interpreters. It includes land, goods, money, insurance policies, stocks and shares - and much else. In family life it most frequently takes shape as follows:

> the home, its furniture and contents, the car, savings (cash, insurance policies, bank account, savings certificates, stocks, shares, contributions to a club, pension fund) - these are typical "family" assets.

0.6 In the Paper we consider proposals for reforming the law as to the ownership of the sort of assets described in the previous paragraph when they are met with in family life. We discuss a number of proposals for reform, some of which are merely extensions of the present law, and some of which relate to systems of ownership and division of property entirely new to English law. The General Introduction summarises the main proposals, shows their relationship to each other, and indicates what, in our view, is the field of choice for reform. We try at this stage to present the more important issues raised by the Paper in a simple, intelligible way, avoiding, where possible, the use of technical language. In the later parts of the Paper, which contain detailed discussion of the legal problems, a certain amount of technicality is unavoidable. A summary of the main parts of the Paper can be found at paragraph 0.25 and the principal questions which we think should be considered appear at the end of the General Introduction (para. 0.50).

0.7 Finally, we should mention that this study of family property law is part of a comprehensive examination of family law which the Law Commission is undertaking with a view to its systematic reform and codification.[4]

0.8 The opinion of members of the public on the topics discussed in the Paper is of great importance. For this reason we seek to give it the widest circulation. Before it is decided what reforms should be introduced we regard it as essential not only to have views on our proposals, but also to obtain information on what married people do with their property and on their attitudes to property which is used, acquired or saved during family life. At our request, the Office of Population Censuses and Surveys, Social Survey Division, is now conducting a survey to ascertain: how married people manage their property and

4. Law Com. No. 14, Jan. 1968: Second Programme of Law Reform.

financial affairs; how far they understand the present law; and their views about the present law and about some of the questions considered in the Paper. It is expected that the results of the survey will be available by the end of 1971.[5]

The case for reform

0.9 The law which at present governs family property is based on the principle of separate property, that is to say, each spouse may acquire and deal with his or her property as if he or she were single. With few exceptions, the fact that two people are married makes no difference to who owns what. The marriage relationship gives rise to certain obligations, including that of support, which may affect directly or indirectly a spouse's liberty to deal freely with his or her property. But neither these obligations nor the marriage relationship itself directly change the ownership of property.

0.10 The English position can be contrasted with that in many Western European countries, and in some parts of the United States, where systems of community of property are in force. These systems can take several forms. Sometimes certain property of the spouses is brought into a community fund during marriage; in every case, at the end of marriage, whether by death or divorce, certain assets must be shared between the spouses, irrespective of whether the item or items in question had been owned originally by one spouse or by both. Thus, marriage directly affects the property rights of the spouses. Under systems of community of property spouses are usually free to contract out by agreeing at the time of marriage that their property relationships are not to be governed by the normal community

5. When the survey has been published it may be possible to distribute a summary of the principal results to those consulted on the Working Paper.

system of that country, but by some other system, such as that of separation of property. But people marrying in England do not have to consider whether to contract out since, in general, marriage of itself does not directly affect ownership rights while both live.[6] A few rich people find it necessary to consider whether to enter into a marriage settlement but their purpose is usually to provide for themselves and their family in a way which will lessen the burden of taxation or preserve a family estate: they are not concerned to alter any legal rules of property.

0.11 Separate property has not always been the rule in English law. Under the common law a husband had extensive rights over his wife's property. The equitable doctrine of trusts was applied to overcome the strictness of the common law, and in the nineteenth century a series of enactments, the most important of which was the Married Women's Property Act 1882, enabled married women to own and control their own separate property.

0.12 Historically, the concept of separate property was introduced as part of the movement for the emancipation of married women. It was an important advance to recognise the power of a married woman to deal with her own property independently of her husband. It operated fairly where a married woman had property or earnings, and was not the cause of hardship where a family had no hope of saving or acquiring property. Even in those cases where a husband had acquired some savings and property, the fact that his wife had no right to share the property but only her right as a dependant to be maintained was, perhaps, taken for granted in a society where it was normal for a woman, on marriage, to pass from dependence on her father to dependence on her husband. But the

6. A will is revoked by marriage, unless made in contemplation of the marriage in question. For other exceptions, see para. 0.17 below.

situation is now seen in a different light. Not only has the number of families able to save and invest increased, but the contrast has become more marked between the position of the married woman and that of her unmarried sister who earns her own living. It is said that equality of power, which separation of property achieves, does not of itself lead to equal opportunity to exercise that power; it ignores the fact that a married woman, especially if she has young children, does not in practice have the same opportunity as her husband or as an unmarried woman to acquire property; it takes no account of the fact that marriage is a form of partnership to which both spouses contribute,each in a different way, and that the contribution of each is equally important to the family welfare and to society.[7]

0.13 The first criticism of the law, then, is that it is unfair. This can be illustrated by taking as an example, the Browns. Mr. Brown earns the family income. The home is in his name and he is responsible for the mortgage repayments and outgoings. Mrs. Brown has given up her employment and earnings to attend to domestic affairs and to look after the family. She has no savings or private income, and cannot contribute in cash to the acquisition of property. If the marriage breaks down, the law regards the home, its contents, and any other property or savings acquired by Mr. Brown in his name, as his sole property. Mrs. Brown has a right to occupy the home and to be maintained, but she does not own the home or any other property acquired out of Mr. Brown's earnings. On a decree of divorce, nullity or judicial separation she may apply to the court for property to be transferred to or settled on her. If Mr. Brown dies leaving a will which disinherits

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7. See the Royal Commission on Marriage and Divorce, (Morton Commission) 1956, Cmd. 9678, para. 644.

her (though this is relatively uncommon) she has a limited right of support, available only on application to a court and at its discretion: she has no right other than to ask for what is normally needed for her support.[8] In short, she has no right of property in her dead husband's estate if he has made a will which disinherits her.

0.14 Several factors such as longer life expectancy, smaller families, and the move to equal pay, are leading to an increase in the number of earning wives and in the level of their financial contribution to the family. Even so, family circumstances, including the needs of young children, often make it impossible for a married woman to work at all, or to work full time, or result in an interrupted working life. The majority of married women either have little or no income, or have lower earnings than their husbands; hence they have less opportunity to acquire property of their own. It seems unlikely that any dramatic social changes will occur in the near future to redress this imbalance. It is said therefore that the law should step in, and ensure that each spouse is entitled to a share in certain family property, irrespective of which spouse acquired it. This, it is said, would acknowledge the partnership element in marriage and would do no more than extend to the relatively uncommon case of the family which needs the support of the law the practice of happy family life.[9] In the great majority of families, there are no property difficulties: homes are frequently put in joint names, there is a joint banking account, and the man, as he grows older, becomes more and more concerned to safeguard his widow.

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8. Inheritance (Family Provision) Act 1938 as amended.

9. It would also give meaning to that part of the marriage cermony (in accordance with the rites of the Church of England) in which the bridegroom undertakes to "endow" on or "share" with his wife his worldly goods. On this see Simon, "With All my Worldly Goods ..." (Holdsworth Club of the University of Birmingham, 1964).

0.15 Criticisms of the present law are not limited to its unfairness. It is complained that the law is uncertain. This has been graphically illustrated by reference to the Jones family:[10] Mr. and Mrs. Jones have been married for ten years and have three children. When they married they bought a house on mortgage. The deposit was paid partly from Mrs. Jones' savings and partly from a loan from Mr. Jones' employer. The mortgage instalments have usually been paid by Mr. Jones. At the beginning Mrs. Jones had a job; she went back to part-time work when the children were older. From her wages she paid a large part of the household expenses and bought some of the furniture. Occasionally she paid the mortgage instalments. A car and a washing machine were bought on hire-purchase in Mr. Jones' name, but the instalments were sometimes paid by him and sometimes by her. Mr. Jones has now left his wife and children and is living with another woman.

0.16 If, in the above situation, Mrs. Jones asks what her property rights are so that she can make arrangements, she will receive no clear answer. In effect, the law will ask her what intentions she and her husband had about the allocation of their property, and to this she would only be able to reply that they had no clear intention. It is said that this is unsatisfactory, and that the law should give " a clear and definite ruling as to what belongs to whom".

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10. This illustration is based on that given by Professor Kahn-Freund in Matrimonial Property: Where do we go from here? (Josef Unger Memorial Lecture, University of Birmingham, Faculty of Law, 1971) p.11.

Outline of present law

0.17 The general principles of separate property are that each spouse has independent and equal power to acquire and deal with his or her property, and that marriage does not alter ownership rights. Nevertheless, there are certain rules, which in practice are mainly applicable to husband and wife and which may affect the ownership of or power to deal with property. First, there are the following rules governing the acquisition and ownership of and succession to property:

(a) A spouse who has contributed to the acquisition or improvement[11] of the other spouse's property may thereby acquire an interest in the property.

(b) The spouses are entitled to share equally savings from a housekeeping allowance made by the husband to the wife, or property acquired with such savings.[12]

(c) Property purchased by a husband in his wife's name is presumed to be a gift to her, in the absence of evidence to the contrary.

(d) A spouse is entitled to a substantial interest in the other spouse's estate if the latter dies intestate.

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11. Matrimonial Proceedings and Property Act 1970, s. 37.

12. Married Women's Property Act 1964.

0.18 Secondly, there are several ways in which the law recognises the family relationship as giving rise to certain property rights. Among these are social security benefits payable to a wife or widow by virtue of her husband's (or, in the case of a divorced wife, her former husband's) contribution; the presumption that a wife, as housekeeper, has power to contract on her husband's behalf for the purchase of household necessaries; the estate duty exemption on the passing of the surviving spouse's life interest; the rule that the transfer of property by one spouse to the other while they are living together is not chargeable to capital gains tax, except in special circumstances; and the adding together of the spouses' income for tax purposes.[13]

0.19 Thirdly, the spouses' property may be affected by support rights enforceable through the courts. The chief rights under present law are:

(a) The right, in some circumstances, to apply for a maintenance order in the magistrates' court.

(b) A similar right to apply for financial provision in the High Court or county court on the ground of wilful neglect to maintain.

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13. Under the Finance Act 1971, s. 23 and Sched. 4, provision is made under which if an election is made a wife's earnings will be charged to tax as if she were a single woman with no other income.

(c) The right to apply for financial provision in proceedings for divorce, nullity or judicial separation.

(d) The right to apply for family provision from the estate of the deceased spouse or former spouse.

(e) The right to occupy the matrimonial home.

0.20 Although we have drawn a distinction between property rights and support rights, they are, in fact, complementary.[14] During a stable marriage the distinction has no importance: each spouse shares the use and enjoyment of the other's property and income and each helps to support the family. But when a marriage ends in breakdown or in death it becomes important for a spouse to know the extent of both property rights and support rights. A wife with property rights in the family assets will have less need to rely on support rights; a wife who successfully enforces support rights against her husband may obtain either the ownership or the use of some of his property. The close relationship between support rights and property rights has been further emphasised by the Matrimonial Proceedings and Property Act 1970 to which we have referred. Under that Act the court, on the grant of a decree of divorce, nullity or judicial separation, has power to order a spouse to make financial provision for the other spouse by way of periodical payments, a lump sum, a transfer or settlement of property, or by variations of settlements. These powers enable the court to effect a redistribution of the family assets upon the termination of the marriage by divorce, nullity or judicial separation.

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14. See the comments of Lord Denning M.R. in Button v. Button [1968] 1 W.L.R. 457, 462 (C.A.) and Gissing v. Gissing [1969] 2 Ch. 85, 92 (C.A.). See Gareth Miller, "Maintenance and Property" (1971) 87 L.Q.R. 66.

0.21 It can be argued that the Act of 1970, taken together with the family provision legislation, makes it unnecessary to consider further changes in matrimonial property law. The argument runs as follows: - in a happy family there is no problem: when marriage ends by separation or death, the court can make the appropriate property adjustments, taking into account the wife's contribution in the home as well as other relevant matters. This argument, however, fails to deal with two important factors. The first is that neither the Act of 1970 nor the family provision legislation affects the spouses' property rights during the marriage. Adequate rules to deal with property during marriage are essential to give a proper sense of security to spouses in the position of Mrs. Jones, and to avoid disputes between Mr and Mrs. Brown which might otherwise lead to breakdown. The second factor is that, largely as a result of the 1970 Act, the court now has wider powers to deal with property when a marriage is terminated by a decree of divorce, judicial separation or nullity than it has when a marriage ends naturally with the death of one spouse. Thus the final irony has been reached: a divorced woman is better protected by the law than is a widow. Such is the price of piecemeal law reform.

0.22 But the basic objection to the argument that the Act of 1970 and the family provision legislation are all that is needed goes deeper. It would, of course, be possible by amendment of existing legislation to give the courts power to adjust the property rights of spouses during the marriage and to ensure that widows were treated by the law as solicitously as separated or divorced women. But even if this were done, the property rights of the parties would have to be assessed by the court in the exercise of its discretion, having regard

to the means, needs and conduct of the parties. It is the discretionary nature of the parties' rights which, as we see it, is the fundamental cause of the present dissatisfaction with the law. In effect what women are saying, and saying with considerable male support, is:

> "We are no longer content with a system whereby a wife's rights in family assets depend on the whim of her husband or on the discretion of a judge. We demand definite property rights, not possible discretionary benefits."

0.23 This demand points to one of the central problems faced by the Paper - the choice between discretionary powers and fixed rights as a basis for dealing with family property. Because many regard discretionary powers as an inadequate means of securing property rights the Paper considers various systems of fixed rights under which each spouse would be given an automatic interest in certain assets, irrespective of which spouse bought them, or in whose name they were, or of discretionary factors. Nevertheless, despite the objections to discretionary powers as a means of securing property rights, they remain an essential element in the enforcement of support rights. The Paper will consider how these discretionary support rights could be extended and improved.

0.24 Although reference has been made to "family assets", the term has no precise legal meaning.[15] It is no more than a synonym for "family property", also a term of no precise legal meaning. These terms are used to describe

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15. See the comments of Lord Upjohn in Pettitt v. Pettitt [1970] A.C. 777.

property acquired by the efforts of the spouses during the marriage, or property of either spouse from any source which is used chiefly for the benefit of the family as a whole; or even, sometimes, all the property of the spouses. We attempt no exact definition: we use either term as a convenient way of describing property in which, it seems reasonable to argue, both spouses should have some interest, either because of the way in which it was acquired or because of the manner in which it is used.[16] Accordingly, Part 1 of the Paper considers the matrimonial home as the principal piece of family property and deals with its ownership and occupation; Part 2 considers the household goods and is concerned with protecting their use and enjoyment; and Part 5 considers whether the family assets to be shared equally on termination of the marriage could be defined in terms of the net gains made by each spouse during the marriage.

16. Kahn-Freund, in Matrimonial Property: Where do we go from here?, attempts to define family assets or household property by reference to the purpose served by any particular item; see, in particular p. 23.

Summary of the Paper[17]

1 The Matrimonial Home

0.25 The matrimonial home is often the principal, if not the only, family asset. Where this is the case, if satisfactory provision could be made for sharing the home, the problem of matrimonial property would be largely solved. Under present rules, apart from any question of gift or agreement, ownership is decided on the basis of: (1) the documents of title, and (2) the financial contribution of each spouse. Part 1 of the Paper considers whether there should be alternative ways or additional considerations for determining ownership.

0.26 One possibility would be to allow the court to decide ownership of the home on discretionary grounds whenever a dispute arose between the spouses, taking into account various factors, including the contribution of each spouse to the family. The provisional conclusion is reached that, on balance, this would not be a worthwhile reform in view of the existing discretionary powers to award financial provision (which include powers to order a transfer or settlement of the property of either spouse) on a decree of divorce, nullity or judicial separation. Further, it would leave ownership uncertain in the absence of litigation.

0.27 Another possibility would be to introduce a presumption that the matrimonial home is owned by both spouses equally. Unless one of the spouses contested the matter, the presumption would apply. In the event of a contest equality would prevail unless the presumption was rebutted. The chief problem under such a system would be

17. Although for the sake of convenience and clarity, certain situations are discussed in terms of "the husband" and "the wife", all the proposals in the Paper are intended to apply equally to each spouse.

to determine the circumstances in which the presumption should be rebutted. The choice may lie between narrow, and perhaps arbitrary, grounds and broad discretionary grounds which might result in considerable uncertainty.

0.28 A third possibility would be to go further than a presumption, which could be rebutted, and to provide that, subject to any agreement to the contrary, the beneficial interest in the matrimonial home should be shared equally by the spouses. We refer to this as the principle of co-ownership. The interests of the spouses would arise not from any financial contribution, nor from any contribution to the welfare of the family, nor from any other factors to be assessed by the court, but from the marriage relationship itself. There are advantages in this solution: it would in the absence of agreement to the contrary apply universally; it would acknowledge the partnership element in marriage by providing that the ownership of the principal family asset should be shared by the spouses; it would provide a large measure of security and certainty for a spouse in case of breakdown of marriage or on the death of the other spouse; and it would help to avoid protracted disputes and litigation.

0.29 The chief argument against the principle of co-ownership is that it could operate unfairly in individual cases. For example, a husband who paid for the house might find that, while he had to share ownership of it with his wife, he had no right to share <u>any</u> of her property. Since the sharing would operate only where spouses owned their home, the principle would not help Mrs. Brown if Mr. Brown chose to invest his money and live in rented accommodation. An automatic rule might even induce him not to buy a home. Besides these objections there are certain practical problems

to be overcome. One is to decide to what extent a spouse who is given an interest should be responsible for the liabilities in respect of the home which she may have no means of discharging unless she shares in assets other than the home. A second is to determine whether a spouse should be called upon to share a home which he or she may have owned absolutely before marriage. A third and serious problem is how to protect the interest of a spouse whose name is not on the legal title, while at the same time safeguarding the interests of a purchaser or mortgagee. This, however, is essentially a matter of conveyancing machinery which should not be impossible to solve if it were decided to introduce the principle of co-ownership. The conclusion is reached that it would be practicable to introduce co-ownership, and that it would, on balance, have advantages over the present law. The Paper proposes that a new form of matrimonial home trust should apply whenever the beneficial interest in the home is shared between the spouses, in order that they should have a direct interest in the property.

0.30 Part 1 also considers proposals for strengthening a spouse's rights of occupation by amending the Matrimonial Homes Act 1967, and concludes that this would be desirable whether or not any of the other solutions were adopted.

2 The Household Goods

0.31 Part 2 of the Working Paper considers whether any changes are necessary in the present law dealing with the ownership and use and enjoyment of the household goods. No precise definition of household goods is put forward but the overall objective would be to make effective a spouse's occupation rights. The present rules governing ownership of the household goods are similar to those which apply to the home itself. Nevertheless, although there may be a case in favour of a presumption of co-ownership of the

goods, our preliminary view is that it is more important at this stage to protect the use and enjoyment of those goods than to change the ownership rules. The reason for this is that such goods usually have a rapidly diminishing realisable value; in most cases a spouse's share in the proceeds of sale of second-hand furniture would not go far towards the cost of its replacement (save in the case of antiques). Because of this a spouse's main concern is to retain the use and enjoyment of the goods and we propose that the spouse in occupation of the home should have this right. This would be essentially a support right supplementing the rights of occupation which are protected under the Matrimonial Homes Act 1967.

0.32 Part 2 also proposes that during marriage either spouse should be able to apply to the court for an order preventing the other spouse from removing the household goods from the home, directing the other spouse to restore the goods to the home, or directing which spouse is to have their use and enjoyment. The problems of applying the proposed system of protection to goods held under hire-purchase or credit sale agreements are also considered; the recommendations of the Crowther Committee,[18] if implemented, would remove many of the difficulties in this field. On termination of marriage by a decree of divorce or nullity, or on judicial separation, the household goods would, of course, remain subject to the court's powers to transfer any property of either spouse. There is a proposal in Part 3 of the Paper that similar powers should be exercisable on an application for family provision from the estate of a deceased spouse.

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18. Report of the Committee on Consumer Credit, 1971, Cmnd. 4596.

3 Family Provision

0.33 Part 3 of the Paper considers the present law and practice under the Inheritance (Family Provision) Act 1938 and section 26 of the Matrimonial Causes Act 1965, and makes proposals for widening the scope of these enactments. At present a surviving spouse or former spouse, and children fulfilling certain conditions of age, sex and marital status,[19] may apply for maintenance from the estate of a deceased person, where the deceased has failed to make reasonable provision for them.

0.34 The right to apply for family provision is a right to be supported. Family provision law need not, however, remain confined to such a role. The Paper considers whether it could be expanded and developed as a system under which the court would be given wide discretionary powers to "re-write the will" by allocating the property of the deceased in order to secure for the surviving spouse a fair share of the family assets, over and above her strict maintenance needs. The provisional conclusion is reached that this would not be an acceptable solution, since property rights would be dependent on discretionary powers, and great uncertainty, involving litigation and expense, would be introduced into the administration of estates.

0.35 Even if one assumes that family provision law is to continue in its present role as a support right there are, in our view, many anomalies and omissions in the law which should be remedied. The present class of applicants is narrowly drawn and the Paper considers whether the right to apply for family provision should be available to all children - whatever their sex or age, and whether married

19. A son under 21, an unmarried daughter, and a child who is by reason of some mental or physical disability incapable of maintaining himself or herself may apply.

or unmarried; it also discusses whether the right to apply ought to be extended to all dependants, whether or not related to the deceased. If the classes of applicants were to be extended, it would, of course, still be necessary to establish that the deceased had failed to make reasonable provision for the applicant. The Paper also proposes that the court's powers should be extended to enable it not only to order lump sums and periodical payments, but also to direct transfers and settlements of property forming part of the estate. Perhaps the most important proposal is to give the court a completely new power to investigate and set aside certain gifts or other transfers of property by the deceased which have had the effect of defeating claims by dependants to family provision. These proposals would give the court powers similar to those which it has on a decree of divorce, nullity or judicial separation.

4 Legal Rights of Inheritance

0.36 Part 4 of the Paper discusses a system under which a surviving spouse would be entitled as of right to a fixed proportion of the estate of the deceased spouse whether he died intestate or testate and regardless of the terms of the will. Under present law a spouse has fixed rights only in the case of intestacy.

0.37 Such a system is to be distinguished from community of property and from the right to apply for family provision. Although theoretically it could co-exist with "community", it would be a needless complication in a law which recognised and enforced a genuine community of property; accordingly we discuss it as an alternative or substitute for "community". It differs from the law of family provision in that an order for family provision is discretionary, and the amount of the order is assessed having regard to the means, needs and conduct of the applicant. A legal right

of inheritance would be a property right in no way dependent upon the means, needs and conduct of the surviving spouse, all of which factors would be irrelevant. The system put forward for consideration is comparable with systems in certain other countries, including Scotland.

0.38 If any system of legal rights of inheritance[20] were introduced, various questions would have to be answered. Chief of these is whether the system should replace the present law of family provision for a surviving spouse, or whether it should be in addition to that law. Provisionally we favour the latter view.

0.39 Other questions which arise are:-

(a) what minimum amount or proportion of the estate should go, as of right, to the survivor,

(b) whether a spouse should be able to waive a right of inheritance,

(c) whether, and if so, how benefits received from the deceased during his life should be taken into account,

(d) how to deal with dispositions made by the deceased with the intention of defeating rights of inheritance,

(e) the relationship between rights of inheritance and the intestacy rules,

(f) whether children should enjoy rights of inheritance.

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20. In Part 4 we use the term "legal rights" to mean the legal rights of inheritance described in these paragraphs.

0.40 We make a number of tentative suggestions as to the way in which these questions might be answered. For instance, we reach the provisional view that children should not have a legal right of inheritance; we suggest £2,000 or one-third of the estate (whichever is the greater) for the surviving spouse;[21] and we indicate that it may be better not to complicate the law by seeking a solution within a system of rights of inheritance of the problems of benefits received or dispositions made during the lifetime of the deceased. The appropriate context in which to consider these problems may well be that of family provision, where the courts will continue to have a discretion to set aside dispositions and to make such financial orders as are considered necessary for the support of the survivor.

0.41 A legal right of inheritance would accrue to a spouse only on the death of the other: thus it could not touch their property rights while both were alive, and would not be available to a spouse on divorce, separation, or nullity (though its loss as a result of divorce, nullity or judicial separation would, like the loss of a pension right, be considered by the court awarding maintenance). These limitations are in contrast with a system of community of property, such as that considered in Part 5, which would operate during joint lives and would be available to the spouses, however their marriage ended. While "community" has the advantage that its rights do not depend upon death, a system of rights of inheritance is less complicated and involves less interference with existing property law. In the great majority of cases - i.e. those in which a spouse makes adequate provision for his widow, or is content to

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21. In Scotland the survivor is entitled to one-third of the movable estate if there are surviving issue, and to one-half if there are no surviving issue.

leave the distribution of his estate to the rules governing an intestacy - there would be no need to invoke the law: a genuine disadvantage of "community" is that it presents all spouses with a complicated legal situation that more often than not requires legal advice to handle successfully.

5 Community of Property

0.42 Part 5 of the Paper considers how a system of community of property could be adapted for English law. The system put forward for consideration is not the traditional one of the Code Civil, but is based on the modern systems in force in Scandinavia and Germany. Under the system proposed, each spouse would be free to acquire and dispose of his or her own property during the marriage, subject only to those restraints which are necessary, even under a system of separate property, for the protection of the family, for example, to protect the other spouse's rights of occupation in the matrimonial home, to protect the use and enjoyment of the household goods, and to enforce support rights. When the marriage ended, whether by death or by a decree of divorce or nullity or on judicial separation, the net assets acquired during the marriage would be shared equally. In effect, this would be done by calculating the value of the spouses' assets; the spouse whose assets were less in value would have an equalisation claim against the other spouse. Where the marriage ended in death the claim would be against the estate of the deceased. The equalisation claim would give rise to a money debt but could be reinforced by giving the court power to order transfer of specific assets in satisfaction of the claim.

0.43 The Paper points out that certain categories of property could be excluded from sharing; for example, property owned by a spouse before marriage or property received during marriage by way of gift or inheritance from a third person. It is suggested that the exclusion be effected by taking account of the value of those assets at the date of the marriage or of their acquisition. The case for excluding these items is that it is difficult to justify the extension of sharing beyond those assets which have been acquired during the marriage by the efforts of the spouses. Another problem is the extent to which each spouse would be made liable for the debts of the other. We suggest provisionally that, except in respect of certain family debts which should be shared, neither spouse should have to surrender more than half his or her net assets even if the other spouse had extensive debts at the end of the marriage. We also suggest that a spouse should be able to call for an earlier sharing of assets, for example, if the other spouse seriously mismanaged his affairs. Although some of the rules necessary to deal with the special situations just described are complex, it is envisaged that for the great majority the system would be less complex than it appears. For example, in the cases of Mr. and Mrs. Jones and Mr. and Mrs. Brown, virtually all their property would be shared at the end of the marriage. A system of community under which substantially all property is shared at the end of marriage may be thought to lead to fewer anomalies in practice than any other system of automatic sharing falling short of community. For example, co-ownership of the home might require one spouse to share his asset while not calling on the other spouse to share anything.

0.44 A community system of the type considered would recognise the partnership element in marriage. It would meet the complaint that the present law is unfair to a spouse who has no earnings or assets, while preserving the independence and equality of the spouses during marriage. Although it would not directly change the ownership of property during marriage it would give the spouse who had little or no assets or earnings a large measure of security and certainty. It would no longer be necessary for that spouse to rely on the court's discretion to secure an interest in the family assets. The court would, however, retain its powers to enforce support rights, either in matrimonial proceedings, or on an application for family provision after the death of a spouse.

The field of choice

0.45 The purpose of the Working Paper is to indicate, in broad terms, the field of choice for the reform of family property law. Some proposals are developments of existing law which, in our view, could be implemented regardless of whether any of the major changes is adopted. This category largely concerns support rights, and includes proposals to extend:

(a) the protection of a spouse's rights of occupation under the Matrimonial Homes Act 1967;

(b) the protection of a spouse's right to the use and enjoyment of the household goods;

(c) the rights of dependants and the powers of the court under family provision legislation.

0.46 Other proposals considered would involve major changes in the present law. These are: co-ownership of the matrimonial home; legal rights of inheritance; and community of property. The following summary shows how each would work in conjunction with the existing support rights. However, none of these schemes is necessarily exclusive of the others, and we refer below to some other possible combinations. The discussion is based on the assumption that proposals (a) to (c) above, relating to support rights, will be implemented.

(a) Co-ownership of the matrimonial home plus support rights during and on termination of marriage.

0.47 This scheme would provide that the beneficial interest in the matrimonial home should be shared equally, but would not otherwise affect ownership of property. During the marriage the spouses would have the benefit of the co-ownership principle, and would also be entitled to the usual support rights. On a decree of divorce, nullity or judicial separation the court would have discretionary powers to order financial provision for either spouse, and could order the transfer or settlement of any property of either spouse, including the home. For example, it could order the home to be transferred to one spouse, or to be sold and the proceeds divided, or to be settled for the benefit of the spouses or children. On the death of a spouse the survivor would already have an interest in the home, and would also have a right to apply for family provision from the estate; on such an application the court would have power to order the transfer or settlement of any property, including the deceased's interest in the home.

(b) Legal rights of inheritance on death plus support rights during and after marriage.

0.48 This scheme would maintain the present rules concerning ownership of property, but would give the surviving spouse a right to inherit a defined proportion of the deceased spouse's estate. During marriage, the spouses would have support rights, including rights of occupation of the home and the right to protection of the use and enjoyment of the household goods. If the marriage ended by divorce, nullity or judicial separation, the court would have discretionary powers to order financial provision for either spouse and could order a trasfer or settlement of the property of either spouse. If the marriage ended in death and the survivor had not been left an adequate amount the legal right of inheritance could be claimed. Our provisional view is that the right to apply for family provision should also be retained to deal with those cases where legal rights were insufficient for the survivor's needs.

(c) Sharing of assets on termination of marriage plus support rights during and after marriage.

0.49 A third scheme would be to introduce a system of community of property, or sharing of assets, such as that discussed in Part 5 of the Paper. Under such a scheme the spouses would, during marriage, continue to have mutual rights of support, including occupation rights in respect of the home and protection of the use and enjoyment of the household goods. At the end of the marriage, whether by death or by divorce or nullity, or on judicial separation their assets would be shared in such

a way as to give one spouse an equalisation claim against the other, and possibly a right to claim specific items of property in satisfaction of the claim. The division would be supplemented by the court's discretionary powers to order financial provision, on a decree of divorce, judicial separation or nullity, or family provision on the death of a spouse.

Questions for consideration

0.50 The Paper puts forward for consideration proposals on which there will be many views. Those who believe that the unfairness of the present law could be overcome by giving the court discretionary powers to distribute property equitably on the termination of marriage by death or divorce would probably favour the present system of separate property, supplemented by extended family provision legislation. On the other hand those who think it is essential to have some form of fixed rights, in order to avoid the pit-falls of discretion and at the same time to achieve security for Mrs. Brown and certainty for Mrs. Jones, would favour either co-ownership of the home, or legal rights of inheritance, or community or some combination of these. For example, co-ownership of the home could be combined with legal rights of inheritance or with community of property.

0.51 At the end of each main Part of the Paper there is a summary of the proposals and questions put forward in that Part. Our object at this stage is to canvass views on which solution or combination of solutions is preferred or on whether there are other possibilities which should be considered. The principal questions which arise in this connection are the following:

(1) Should the law provide that, in principle, certain property should be shared between husband and wife irrespective of who paid or of their means, needs or conduct?

(2) If the law were to provide that certain property should be shared between husband and wife, how should this be done?

(a) By giving both spouses an automatic and direct interest in certain property, such as the matrimonial home?

(b) By giving the surviving spouse a fixed right of inheritance on the death of the other spouse, but no fixed rights on divorce?

(c) By sharing the spouses' property at the end of the marriage, whether on death or divorce?

(3) If it were decided that the matrimonial home should be automatically shared by husband and wife:

(a) Should a home owned by one spouse before marriage, or acquired during marriage by gift or inheritance be shared?

(b) Should each spouse be liable to contribute to the outgoings of the home?

(4) If the surviving spouse were to be given a fixed right of inheritance:

(a) Should provision be made to prevent the deceased from reducing his estate by giving away property during his life?

(b) Should the survivor be able to apply to the court for further provision from the estate on the ground that the fixed rights did not provide adequate maintenance?

(5) If it were to be provided that the spouses should share property at the end of the marriage, whether on death or divorce, what property should be shared?

(a) All their property?

(b) All their property which could be regarded as given over to the family use, such as the matrimonial home and household goods?

(c) All their property acquired during the marriage?

(d) All their property except property owned before marriage or property acquired during the marriage by way of gift or inheritance from a third party which has not been given over to the family use?

PART 1

THE MATRIMONIAL HOME

INTRODUCTION

1.1 In any survey of family property law, the matrimonial home occupies a place of the greatest importance. The family, particularly the spouses, tend to regard the home they live in as "theirs" irrespective of the legal position. It is becoming more and more common for families to own or to be acquiring their own homes. Recent statistics show that nearly 50 per cent of households are owner-occupied.[1] In many cases the home is the only substantial asset of the family.[2]

1.2 While a marriage is happy, the home will normally be used for the benefit of the family irrespective of who owns it. But when a marriage breaks down, it becomes important to the spouses to know the extent of their rights in relation to the home. This part of the Paper deals with:

(a) the occupation of the matrimonial home, and

(b) the ownership of the matrimonial home.

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1. Home ownership in England and Wales. Second Report (Housing Research Foundation, 1970). The figures quoted are taken from the 1966 Sample Census. They show that in 1966 of 15,360,000 private households, 46.7% were owner occupied. The Report estimated that by 1970, 50% would be reached.

2. H.F. Lydall, British Incomes and Savings (1955) p.103, and Table 82, p.171.

A. RIGHTS OF OCCUPATION

1.3 At common law, whichever spouse owns the home, each spouse has a personal right to share the occupation of that home. This right arises from the mutual obligation of the spouses to live together, and will be lost if the right to consortium has been lost by reason of misconduct.[3] After separation, the wife retains her personal right to remain in the husband's home even after he has left it, or to be provided with other accommodation, unless she has lost her right to be supported.[4] While matrimonial proceedings are pending, the wife may obtain an injunction to exclude the husband from his home where this is necessary for her protection or where it is impossible for them to live in peace.[5] The husband, on the other hand, apparently could not claim to remain in possession after

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3. Shipman v. Shipman [1924] 2 Ch. 140, 146 (C.A.); Gorulnick v. Gorulnick [1958] P. 47 (C.A.); National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175, 1220, 1230-1233 (H.L.); Gurasz v. Gurasz [1970] P. 11, 16 (C.A.).

4. Lee v. Lee [1952] 2 Q.B. 489n. (C.A.); Silverstone v. Silverstone [1953] P. 174, 177; Cook v. Cook [1964] P. 220; National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175, 1220 (H.L.); Gurasz v. Gurasz [1970] P.11, 16 (C.A.).

5. Silverstone v. Silverstone [1953] P. 174; Cook v. Cook [1964] P. 220; Jones v. Jones [1971] 1 W.L.R. 396 (C.A.); Hall v. Hall [1971] 1 W.L.R. 404 (C.A.). The wife's right is not necessarily brought to an end by a decree of judicial separation (Hutchinson v. Hutchinson [1947] 2 All E.R. 792) but it ceases on the grant of a decree absolute; thereafter she may become a trespasser unless she can show some contractual right to remain: Vaughan v. Vaughan [1953] 1 Q.B. 762 (C.A.); Morris v. Tarrant [1971] 2 W.L.R. 630.

his wife left, if the home belonged solely to her.[6] The right to occupy the home after separation is, at common law, part of the right to be supported.

1.4 Where the legal title is vested in one spouse, the common law position has been virtually superseded by the Matrimonial Homes Act 1967, which implements in a modified form recommendations of the Morton Commission.[7] The Act deals with the situation arising from the House of Lords' decision in National Provincial Bank Ltd. v. Ainsworth.[8] It applies where one spouse (whether husband or wife) is entitled to occupy a dwelling house by virtue of any estate, interest, contract or enactment, and the other spouse is not so entitled. The latter spouse has statutory rights of occupation which may be enforced against the former spouse and which are a charge on the former spouse's estate or interest. They may also be protected by registration as a Class F Land Charge, or by a notice or caution in the case of registered land; if so protected, they will prevail against any person deriving title from the first spouse. The statutory rights of occupation are, thus, more than mere personal rights, and are, if registered, elevated to the status of rights in property. They will not, however, prevail against the trustee in bankruptcy of the first spouse.

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6. Rawlings v. Rawlings [1964] P. 398, 416 (C.A.) per Harman L.J. ; cf. Bedson v. Bedson [1965] 2 Q.B. 666 (C.A.). See also Jones v. Challenger [1961] 1 Q.B. 176 (C.A.). Until the court has ordered him to go, or until decree absolute, he is not a trespasser: Morris v. Tarrant [1971] 2 W.L.R. 630.

7. Royal Commission on Marriage and Divorce 1951-1955, Cmd. 9678, paras. 662-698.

8. [1965] A.C. 1175 (H.L.).

1.5 It was at one time arguable that the Act did not apply where a spouse who was not the legal owner had a beneficial interest in the home, since that spouse was, or might be, entitled to occupy the home by virtue of that beneficial interest.[9] An amendment of section 1 has now made it clear that such a spouse is not precluded from the statutory rights of occupation.[10] Where the legal title is in the joint names of the spouses the Act of 1967 has no application. We consider and make proposals concerning disputes between joint owners in a later section of the Paper.[11] In this section, therefore, we consider only the situation which arises when the legal title or tenancy is in the name of one spouse.

1 DURING THE MARRIAGE

1.6 The statutory rights of occupation under section 1(1) of the Matrimonial Homes Act 1967 are (a) if in occupation, a right not to be evicted or excluded from the dwelling house by the other spouse except with the leave of the court, and (b) if not in occupation, a right with the leave of the court to enter into and occupy the dwelling house. Under section 2 a spouse's statutory rights of occupation are a charge on the other spouse's estate or interest. As long as a spouse remains in occupation this charge may be protected by registration. However, it has been held that a spouse out of occupation who has not yet effected a registration has no right capable of registration

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9. Bull v. Bull [1955] 1 Q.B. 234 (C.A.); Cook v. Cook [1962] P.235, 242, 243 (C.A.); cf. Barclay v. Barclay [1970] 2 Q.B. 677 (C.A.) (Note: (1970) 86 L.Q.R. 443).

10. The Matrimonial Proceedings and Property Act 1970, s.38, inserted subsection (9) in section 1 of the 1967 Act.

11. Paras. 1.119-1.121 below. For cases concerning disputes between joint owners, see Gurasz v. Gurasz [1970] P.11 (C.A.); Jackson v. Jackson [1971] 1 W.L.R. 59.

until the court has given leave to enter.[12] This decision means that a spouse who has been excluded from the matrimonial home, and who may have good prospects of succeeding in an application for leave to enter, will in the meantime be unable to protect the position by registration.

1.7 Although it has been held that the court may make an interim order giving leave to enter, which may then be registered,[13] in our view this does not go far enough. A spouse out of occupation who has applied for an order under section 1(1)(b) ought to be able to get immediate protection by registering the application.

> We therefore propose that a spouse who has made such an application should be permitted to register the application as a lis pendens under the Land Charges Act 1925, section 2(1), or to protect it in the appropriate manner under section 59 of the Land Registration Act 1925.

To prevent the use of this right for "blackmailing" purposes it would be necessary to give the court power to order the registration to be discharged if the proceedings were not prosecuted in good faith and with due diligence.[14]

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12. Rutherford v. Rutherford [1970] 1 W.L.R. 1479 (Foster J. ordered a class F land charge to be vacated); cf. Baynham v. Baynham [1968] 1 W.L.R. 1890 (C.A.) per Lord Denning M.R. at 1895. For a criticism of Rutherford v. Rutherford, see Oerton, "Rights of Occupation" (1971) 121 N.L.J.7.

13. Baynham v. Baynham [1968] 1 W.L.R. 1890 (C.A.).

14. Under the Land Charges Act 1925, s.2(6), the court may, "upon the determination of the proceedings, or during the pendency thereof if satisfied that the proceedings are not prosecuted in good faith, make an order vacating the registration of the pending action..." This power may not be wide enough for the purposes we envisage.

1.8 Under section 1(2) of the Matrimonial Homes Act 1967:

> "So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house."

Under section 1(3):

> "On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case,..."

It was held in Maynard v. Maynard that the power to make an order under subsection (3) is limited to orders within the class permitted by subsection (2), and that although the court could terminate the statutory rights of occupation of the non-owner spouse, the word "regulating" in subsection (2) does not empower it to terminate the owner or tenant spouse's occupation.[15] However, in a recent decision, the Court of Appeal has now held that the word "regulating" should be given a reasonably liberal meaning, and that although it may not authorise an absolute prohibition it empowers the court to exclude the owner or tenant spouse for a limited period or until further order.[16]

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15. Maynard v. Maynard [1969] P.88, 100-101. Although the court refused to grant an injunction under the Act, it granted an injunction under its inherent jurisdiction, see n.5 above; cf. Baynham v. Baynham [1968] 1 W.L.R. 1890 (C.A.), in which an order was made under the Act granting the wife the right to occupy to the exclusion of the husband.

16. Tarr v. Tarr [1971] P.162 (C.A.); Edmund Davies L.J., at 166, referred to the unnecessarily obscure language of the Act. Comment: S.Cretney, "Excluding Husband from Home" (1971) 121 N.L.J. 376.

This decision resolves one of the difficulties raised by Maynard v. Maynard.[17]

1.9 Under section 1(5) the spouse with rights of occupation under section 1 is entitled to discharge the liabilities of the owner or tenant spouse in respect of rent, rates, mortgage payments or other outgoings. For example, if the husband leaves the wife in the home (or if she is restored to occupation by the court) her payments to the building society or the landlord in satisfaction of the husband's liability are as good as if they were made by him.[18] If the home is held under a Rent Act tenancy, section 1(5) provides that her occupation is to be treated as possession by the husband; the intention is that his tenancy, and therefore her rights, should continue.

1.10 Two recent decisions have shown the limits on a spouse's right to step into the other spouse's shoes under section 1(5). The first is Penn v. Dunn.[19] The husband was a statutory tenant who had left his wife in occupation; he continued paying the rent for a time, then ceased to do so. The landlord brought an action for possession against the husband and wife, and obtained a possession order against the husband. No order was made against the wife. He then sought an order for possession against the wife as a trespasser. She applied under section 11 of the Rent Act 1968 which enables a tenant to

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17. Para. 1.22 below discusses a similar problem arising under s.7.

18. There is a special provision under s.1(5) which preserves any claim by a spouse against the other spouse to a beneficial interest by virtue of the payments. This does not affect the position of the mortgagee.

19. [1970] 2 Q.B. 686 (C.A.).

apply to the court to suspend execution of the order and to restore the tenant's rights on such terms as to payment of rent or otherwise as the court thinks fit. The court held as follows:

(a) applications under section 11 can be made only by the statutory tenant;

(b) the wife's rights of occupation (including her right to have her occupation treated as possession by her husband) continued only so long as the husband was "entitled to occupy" as a statutory tenant, and were therefore terminated when the possession order was made against him.

1.11 Two members of the court drew attention to the possible hardships which might arise because a tenant's wife could not apply under section 11. Salmon L.J. said: "it seems anomalous that ... [after a possession order] she has none of the rights that her husband would then have".[20] Cross L.J. said: "It is illogical that she should not have such a right and ... it is not difficult to think of cases in which the absence of such a right would work injustice".[21] We agree.

Accordingly, we propose that section 11 of the Rent Act be amended to give to a statutory tenant's spouse who is occupation the right to apply to the court.

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20. At 691.

21. At 696.

1.12 The other case is Hastings and Thanet Building Society v. Goddard.[22] The husband had left the wife in occupation and had then defaulted under the mortgage. The building society obtained an order for possession against him. The wife applied to be made a defendant to the proceedings. The Court of Appeal held that the building society had no obligation to inform the mortgagor's wife that the mortgage was in arrears. It was said that such a requirement would be impracticable, because a building society could scarcely be expected to keep track of the matrimonial status of its mortgagors, and it would probably be undesirable as likely to lead to trouble between the spouses. The court held further that it was not necessary to serve notice of the proceedings on the mortgagor's spouse in occupation. Although it might be proper to allow the wife to be joined if she had a real prospect of paying the mortgage, which she was, of course, entitled to do under section 1(5), she had no prospect of doing so in the present case.

1.13 The court referred to section 36 of the Administration of Justice Act 1970, but did not consider its effect as it was not then in force.[23] Under that section, where a mortgagee brings a possession action (other than an action for foreclosure), if it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any sums due or remedy any breach, the court may exercise certain powers. These powers include adjourning the proceedings or, on judgment

22. [1970] 1 W.L.R. 1544 (C.A.). See S. Cretney, "The Wife and the Building Society" (1971) 121 N.L.J. 75.

23. This section implements, in a modified form, a recommendation of the Payne Committee on the Enforcement of Judgment Debts, Cmnd. 3909, para. 1390. It came into force on 1 February 1971.

or at any time before execution, staying or suspending execution or postponing delivery of possession on such terms as the court thinks fit.

> We propose that where a mortgagee seeks to recover possession the mortgagor's spouse in occupation should have the same right as the mortgagor to apply to the court for the exercise of its discretion in his or her favour under section 36 of the Administration of Justice Act 1970.

1.14 We further propose that if the spouse of a mortgagor has protected his or her rights of occupation by registration under the 1967 Act, the mortgagee should be required to give that spouse notice of proceedings against the mortgagor for recovery of possession. It should also be made clear that the spouse could apply to be joined as a party to the proceedings for possession.

Leave to be joined ought to be given only where there is a reasonable prospect of the applicant spouse being able to discharge the mortgage obligations. In view of the decision in Penn v. Dunn[24] it should also be provided that these rights should not cease to exist merely because the other spouse is no longer entitled to occupy, e.g. where a possession order has been made against him.

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24. [1970] 2 Q.B. 686 (C.A.), para. 1.10 above.

2 ON DIVORCE OR NULLITY

1.15 A spouse's rights of occupation under the Matrimonial Homes Act 1967 last only while the marriage subsists. Under sections 1(8) and 2(2) they are in general brought to an end by the death of the other spouse, or by the termination of the marriage by divorce or nullity. There are two exceptions to this rule:

(a) Extension of rights of occupation

1.16 The first exception is that under section 2(2) the rights of occupation are not brought to an end if "in the event of a matrimonial dispute or estangement the court sees fit to direct otherwise, by an order made under section 1 above during the subsistence of the marriage". The effect of this provision, read together with section 5, appears to be that the court must state expressly that the order is to continue notwithstanding a divorce. Otherwise, even if an occupation order had been made for a fixed period of years, it would come to an end on a divorce within that period. An order under section 2(2) extending rights of occupation beyond the termination of the marriage must be made before the decree absolute; it may then be registered under section 5. If no extension order is so made and registered the Chief Land Registrar must cancel any earlier registration on production of a copy of the decree.[25]

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25. Matrimonial Homes Act 1967, s.5.

1.17 Once the decree is made absolute, then, unless an extension order has been made under section 2(2), the spouses revert to their position under the general law. The former wife can no longer rely on any statutory or common law right to remain in occupation.[26] The court has power to deal with the home as part of financial provision, whether it was owned by one spouse or by both. It could, for example, reduce maintenance payments on an undertaking that a spouse be allowed to remain in occupation of the home;[27] order a transfer or settlement of the home by one spouse for the benefit of the other spouse or of children of the family;[28] or, where both spouses had beneficial interests in the home, vary these interests as a post-nuptial settlement.[29]

1.18 These indirect powers to deal with occupation do not give the same protection as an order under the 1967 Act. Unless an extension order under that Act is made before decree absolute, the protection of the Act lapses, and no later order can take effect as a charge. It seems anomalous and unsatisfactory that the court cannot deal directly with the occupation of the home after a divorce. An order that a spouse be allowed to occupy the home is merely one way of making financial provision for that spouse, and should be considered in conjunction with the court's powers to order periodical or lump sum payments,

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26. Vaughan v. Vaughan [1953] 1 Q.B. 762 (C.A.); unless the spouses had made an agreement which could be enforced.

27. Ibid., per Denning L.J. at 769.

28. Matrimonial Proceedings and Property Act 1970, s.4(a) and (b).

29. Matrimonial Proceedings and Property Act 1970, s.4(c); Cook v. Cook [1962] P.235 (C.A.); Ulrich v. Ulrich and Felton [1968] 1 W.L.R. 180 (C.A.).

or transfers or settlements of property, and be subject to the same criteria.[30]

> We therefore propose that the court's powers to order financial provision on granting a decree of divorce, nullity or judicial separation should include power to deal directly with rights of occupation in the matrimonial home, and that an order granting occupation rights should have a similar effect to that of an order under the 1967 Act.

This proposal would not affect the court's power under sections 1 and 2(2) of the 1967 Act to make an order during the subsistence of the marriage expressed to continue beyond the date of decree, but such an order should be subject to variation by the court granting the decree.

(b) Transfer of tenancies

1.19 The second exception to the rule that statutory occupation rights cease on divorce or nullity arises where the home is subject to the Rent Acts. Under section 7 of the Matrimonial Homes Act 1967, the court granting a decree of divorce or nullity may order that, as from the decree absolute, the tenancy be transferred from one spouse to the other. If an order is made, the first spouse is relieved of liabilities falling due after the date of decree absolute, and the court may direct both parties to be jointly and severally liable for all liabilities falling due before that date. Tenancies to which the Rent Acts apply are,

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30. The close relationship between applications for financial provision, applications under the Matrimonial Homes Act 1967 and applications under s.17 of the Married Women's Property Act 1882, and the desirability of having the applications and appeals therefrom heard by the same tribunal is recognised in a Practice Direction of 29 Jan. 1971, [1971] 1 W.L.R. 260.

broadly, those of dwelling houses with a rateable value (on 23 March 1965) of not more than £400 in Greater London, or £200 elsewhere, unless they are let at no rent or at a rent of less than two-thirds of the rateable value.[31]

1.20 It has been suggested that the court's power to transfer tenancies on divorce should apply generally and not be limited to tenancies to which the Rent Acts apply. Section 7 is based on a recommendation of the Morton Commission.[32] Their reason for limiting the recommendation to Rent Act cases was as follows:[33]

> "We have confined our proposal ... to tenancies to which the Rent Restriction Acts apply because we think that it would be undesirable to interfere with the rights of the landlord to this extent in respect of other tenancies. In any event, so far as periodic tenancies outside the scope of the Acts are concerned, it is not possible to afford the wife effective protection, since the landlord would always be free to give her notice to quit under the terms of the original agreement."

So far as concerns lettings which do not come within the rateable value limits fixed by the Rent Acts, we agree with the Morton Commission's reasons and do not propose the extension of section 7 of the Matrimonial Homes Act 1967 to cover such cases. Nevertheless there are many lettings which, although within the rateable value limits, are expressly excluded from the Rent Acts and which, therefore, are not covered by section 7. The excluded lettings are, broadly, those where the landlord's interest belongs to

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31. The Government has announced its intention not to raise these rateable value ceilings, despite the recommendation of the Francis Committee on the Rent Acts (Cmnd. 4609): H.C. Deb. 10 March 1971, cols. 422-431.

32. Cmd. 9678, para. 697 (ii).

33. Ibid., para. 690.

the Crown or to a Government department,[34] and those where the landlord is a local authority, the Commission for the New Towns, the Housing Corporation, a development corporation, a charitable housing trust or, in certain circumstances, a housing association.[35] Since local authority lettings account for nearly two-thirds of all unfurnished lettings,[36] this seems unfortunate. Although it appears that in practice councils generally permit widowed, divorced or separated wives either to take over the tenancy or to move to alternative accommodation, the extension of section 7 to these lettings would encourage and give legal force to this practice. The transferee spouse would not acquire any greater rights against the landlord than those of the original tenant. Hence, the landlord could continue to exercise the usual powers of termination. Further, under section 7(6) the court is required to give the landlord an opportunity of being heard. In these circumstances there seems to be little justification for excluding any of the lettings mentioned in sections 4 and 5 of the Rent Act 1968 from the application of section 7 of the Matrimonial Homes Act 1967, even though the transferee spouse would not acquire any security of tenure.

> We propose that section 7 be extended to all lettings, provided that they are within the rateable value limits laid down by the Rent Acts.

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34. Rent Act 1968, s.4.

35. Rent Act 1968, s.5.

36. According to the Family Expenditure Survey, Report for 1969, p.78, of a sample of 3,341 unfurnished lettings, 2,135 were local authority lettings.

1.21 In the case of tenancies which remain outside the scope of section 7, where the tenancy is a lease for a term of years, the court granting a decree of divorce or nullity has power to order a transfer of the lease[37] provided that assignment is permitted by the lease and the landlord's consent is obtained if necessary. It seems to us anomalous that the special power to transfer tenancies under section 7 of the Matrimonial Homes Act 1967 should be separated from the general powers to transfer property under the Matrimonial Proceedings and Property Act 1970. The criteria laid down by section 5 of the 1970 Act should apply to the special power under section 7 of the 1967 Act and there seems no reason to confine the exercise of the section 7 power to the period between decree nisi and decree absolute.

> We therefore propose that the powers conferred on the court by section 7 of the Matrimonial Homes Act 1967 should become part of the court's powers to deal with financial provision on granting a decree of divorce or nullity under the 1970 Act.

It should also be considered whether to extend the exercise of the power to cases of judicial separation.

1.22 There is one final matter which sould be mentioned in relation to section 7. In Maynard v. Maynard[38] it was held that although the court had power under section 7(3) to order that the original tenant should cease to be entitled to occupy the home from the date of decree absolute it had no power under that section to order him to leave the premises.

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37. Matrimonial Proceedings and Property Act 1970, s.4.

38. [1969] P.88.

We propose that it be made clear that the court has power to make an order under section 7 of the Matrimonial Homes Act 1967 directing the original tenant to leave the premises.[39]

3 ON THE DEATH OF A SPOUSE

(a) Extension of rights of occupation

1.23 Where the spouse who is the owner or tenant dies, then, as on divorce, the statutory rights of occupation cease, unless the court has directed otherwise by an order made before the death of the spouse. Such an order can be made only in the event of a matrimonial dispute or estrangement,[40] and, presumably, the court must expressly state that the rights of occupation are to continue notwithstanding divorce or the death of the owner or tenant spouse. The effect of these provisions is that unless the surviving spouse had obtained during the subsistence of the marriage an order to occupy for a fixed or indefinite period, notwithstanding divorce or the death of the other spouse, the rights of occupation under the Act would lapse, even if they had been protected by registration. Under section 5, the registration must be cancelled on proof of death unless there had been an express order extending rights of occupation beyond the termination of the marriage.

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39. In the majority of cases the court would now be able to make an order under s.1: Tarr v. Tarr [1971] P.162 (C.A.), overruling Maynard v. Maynard on this point.

40. Matrimonial Homes Act 1967, s.2(2).

1.24 In our view, the court exercising family provision jurisdiction should have the same power to deal with occupation rights as those which the court granting a decree of divorce, nullity or judicial separation could exercise if our earlier proposal were implemented.[41]

> We therefore propose that whether or not an order concerning occupation rights had been made during joint lives, a surviving spouse should be entitled to apply under the Inheritance (Family Provision) Act 1938 for an order granting or extending occupation rights in the matrimonial home.

The power to deal with occupation rights should become part of the powers to deal directly with property which, in another part of the Paper,[42] we propose should be given to the court exercising family provision jurisdiction. The terms of an order, and its effect, should be similar to those of orders under the Matrimonial Homes Act 1967, section 1.[43]

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41. Para. 1.18 above.

42. Para. 3.28 below.

43. As the right of occupation would depend on a court order which could include appropriate terms as to payment of outgoings, etc. (cf. Matrimonial Homes Act 1967 s.1(3)), the difficulties which were foreseen by the Committee on the Law of Intestate Succession in giving an automatic right to reside in cases of intestacy would be avoided. Report of the Committee on the Law of Intestate Succession, 1951, Cmd. 8310, para. 27.

(b) Transmission of tenancies

1.25 If the matrimonial home is held by a husband under a Rent Act tenancy, on his death his widow will become the statutory tenant by succession, but only if she was residing with him at his death.[44] The proviso could lead to an anomalous situation. A wife who is deserted by her husband is entitled, under section 1 of the Matrimonial Homes Act 1967, to continue the protected tenancy by remaining in occupation and by paying the rent.[45] If there is a divorce or nullity, the court can transfer the protected tenancy to her.[46] But if her husband dies without any divorce or nullity, she will have no right to succeed to the tenancy, unless she can show that despite his desertion he could still be regarded as residing with her at the premises.

> We propose that a wife who has continued a protected or statutory tenancy by remaining in occupation after her husband's departure be given the benefit of the transmission provisions under Schedule I of the Rent Act 1968.

1.26 Another anomaly is that the rules concerning transmission of statutory tenancies apply only in favour of a widow, and not a widower. A widower may, of course, be regarded as a successor tenant if he was a member of his deceased wife's family residing with her at the time of, and for the period of six months immediately before, her death.[47] But his right to succeed to the tenancy in

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44. Rent Act 1968, Sch.1, para. 2.

45. Matrimonial Homes Act 1967, s.1(5).

46. s.7.

47. Rent Act 1968, Sch. 1, para.3.

such a case is not necessarily exclusive, as there may be other members of the family equally qualified; disputes may be settled in county court proceedings. The rights of occupation under the Matrimonial Homes Act 1967 apply equally to husbands and wives. In our view husbands and wives should also be treated in the same way by the Rent Acts.

> We therefore propose that a widower be given the same right to succeed to a statutory tenancy under Schedule 1 of the Rent Act 1968 as a widow.

B. OWNERSHIP OF THE MATRIMONIAL HOME

1 PRESENT RULES

1.27 In this section we describe as briefly as possible the technical and complex rules governing the ownership of the matrimonial home. Readers who are not interested in the niceties of property law will find a short summary of the general effect of the present law at the end of this section.[48]

48. Paras. 1.49-1.51.

(a) Ownership during marriage

1.28 With certain exceptions, the ordinary rules of property law are applied to determine the ownership of the matrimonial home.[49] These rules are:

(i) The conveyance or other document of title establishes the legal title to property; an interest can be created or disposed of only by writing signed by the person creating or conveying the same.[50]

(ii) A declaration of trust respecting an interest in land must be evidenced by writing and signed.[51]

(iii) A disposition of a trust or equitable interest must be in writing and signed.[52]

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49. Pettitt v. Pettitt [1970] A.C. 777 (H.L.) per Lord Morris at 803, Lord Upjohn at 812-813; Gissing v. Gissing [1970] 3 W.L.R. 255 (H.L.) per Viscount Dilhorne at 262, Lord Diplock at 267.

50. Law of Property Act 1925, s.53(1)(a). In the case of registered land, although the terminology differs, the principles are the same.

51. s.53(1)(b).

52. s.53(1)(c).

1.29 Where the documents of title expressly declare both the legal and beneficial interests in the property, this is generally regarded as conclusive under the above rules in the absence of fraud or mistake.[53] But where the documents are silent as to the beneficial interest, they are not necessarily conclusive as regards that interest, since the above rules do not affect the creation of resulting, implied or constructive trusts.[54] Where a conveyance is made to one person, but the purchase price is provided by another (the purchaser), a resulting trust in a favour of the purchaser is presumed.[55] Similarly, if the purchase price is provided by two or more persons and the property is conveyed to one of them, a resulting trust on behalf of both is presumed, in proportion to their contributions.[56] The presumption can, in either case, be displaced by evidence of an intention to the contrary. The resulting trust is of great importance in establishing the respective property rights of husband and wife especially where both have contributed to the purchase price. But it does not apply if the person to whom the property is conveyed is the wife (or the child) of the purchaser; in such a case it is presumed that the

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53. Brown and Staniek v. Staniek (1969) 211 E.G. 285; Boydell v. Gillespie (1971) 216 E.G. 1505; Pettitt v. Pettitt [1970] A.C. 777 (H.L.) per Lord Upjohn at 813; in other cases it has been suggested that an express declaration is conclusive only if it expressed the real intention of the parties, and was intended to be binding whatever might happen: Wilson v. Wilson [1963] 1 W.L.R. 601 (C.A.); Bedson v. Bedson [1965] 2 Q.B. 666 (C.A.); Mayes v. Mayes (1969) 210 E.G. 935; Wilson v. Wilson [1969] 1 W.L.R. 1470. See also Gareth Miller, "Conveyance and Beneficial Interests" (1970) 34 Conv. 156.

54. Law of Property Act 1925, s.53(2). See Gissing v. Gissing [1970] 3 W.L.R. 255, 267 (H.L.), per Lord Diplock.

55. Dyer v. Dyer (1788) 2 Cox Eq. 92, 93.

56. Bull v. Bull [1955] 1 Q.B. 234(C.A.).

purchaser intended to make a gift.[57] This presumption of advancement can itself be rebutted by evidence of intention to the contrary.[58]

(i) Purchase price provided by one spouse

1.30 If the whole purchase price (including the initial capital payment and the mortgage repayments) is provided by one spouse and the home is conveyed into the name of that spouse, it is the sole property of that spouse. This applies whether the property was acquired before or during the marriage. An equitable interest in favour of the other spouse must be proved by writing.[59]

1.31 If the property is conveyed into the name of the spouse who did not provide any part of the purchase price then different presumptions apply according to whether the husband or the wife provided the purchase price:

(a) If the wife provided the purchase price and the property was conveyed into the name of the husband, the presumption of resulting trust applies. In the absence of evidence to the contrary the husband will be

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57. See Lord Upjohn in Pettitt v. Pettitt [1970] A.C. 777 at 814 (H.L.); Gascoigne v. Gascoigne [1918] 1 K.B. 223; Silver v. Silver [1958] 1 W.L.R. 259 (C.A.); Dunbar v. Dunbar [1909] 2 Ch. 639; Toghill v. Toghill (1971) 217 E.G. 645(C.A.);cf. Soar v. Foster (1858) 4 K. & J. 152.

58. See n. 62 below.

59. Law of Property Act 1925, s.53(1)(b). There is an exception if the other spouse acquires an interest by a contribution to the improvement of the property, see para. 1.40 below.

regarded as holding the property on trust for the benefit of his wife.[60]

(b) On the other hand, if the husband was the purchaser and the property was conveyed into the name of the wife the presumption of advancement negates the resulting trust. The husband is presumed to have made a gift to his wife, who therefore has both the legal and equitable title to the property.[61] This presumption can be rebutted by evidence to the contrary.[62]

1.32 If the property had been conveyed into joint names, prima facie the same presumptions apply. If the wife provided the whole purchase price there would be a resulting trust to her in respect of the whole, and if the husband provided the whole purchase price he would be presumed to have made a gift to his wife of half.[63] The better view seems to be that where the wife purchaser puts the property into joint names this fact is some evidence of intention to create a joint beneficial tenancy,

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60. Mercier v. Mercier [1903] 2 Ch. 98 (C.A.). Lord Upjohn in Pettitt v. Pettitt, at 815, suggested that "there will in almost every case be some explanation (however slight) of this (today) rather unusual course". See Wray v. Steele (1814) 2 V. & B. 388.

61. Note 57 above.

62. Silver v. Silver [1958] 1 W.L.R. 259(C.A.); Falconer v. Falconer [1970] 1 W.L.R. 1333(C.A.). Proof of fraudulent intent cannot be set up to rebut a presumption of advancement: Gascoigne v. Gascoigne [1918] 1 K.B. 223; Re Emery's Investment Trusts [1959] Ch.410; Tinker v. Tinker [1970] P. 136 (C.A.).

63. Re Hicks (1917) 117 L.T. 360 (Ch.D.).

and may be sufficient to rebut the presumption of resulting trust.[64]

1.33 In situations where a presumption arises the court can consider evidence of the parties' intentions and all the surrounding circumstances in deciding whether the presumption is rebutted. If there is no evidence, if it is inconclusive, or if it confirms the presumption, then the presumption will apply. Since there will nearly always be some evidence while both parties are living, the most important application of the presumptions now is after the death of a spouse, where the beneficial ownership has to be determined for estate duty purposes.

1.34 We leave open for the present the desirability or otherwise of the presumption of advancement. If changes in the law put forward in this part of the Paper were implemented, neither the presumption of advancement nor that of resulting trust would have any further relevance as regards the matrimonial home. If changes considered in Part 5 of the Paper (Community of Property) were introduced, these presumptions would have little relevance to any of the property rights of the spouses. Because of this, we have included the presumption of advancement among those items which cannot conveniently be considered until the future shape of family property law has been settled.[65]

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64. Pettitt v. Pettitt [1970] A.C. 777 (H.L.) per Lord Upjohn at 815; Snell, Equity (26th ed.) p.194; cf. Grzeczkowski v. Jedynska (1971) 121 N.L.J. 83 (C.A.).

65. See General Introduction, para. 0.45 ff.

We recognise, however, that a presumption which operates in favour of one spouse only is an apparent anomaly in modern times.[66]

(ii) Purchase price provided by both spouses

1.35 When the purchase price is contributed by both spouses prima facie the beneficial ownership of the property is vested in them by resulting trust in proportion to their original contributions.[67] This is subject to any intention or agreement of the parties, express[68] or implied, to which the court will give effect. Conveyance into joint names will, of course, strengthen the inference that the beneficial interest was intended to be held jointly. Intention is of particular importance in establishing whether a particular payment was a gift

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66. The Morton Commission,Cmd. 9678, para.703 recommended "that the presumption of advancement should operate in the husband's favour in the same way as it operates in the wife's favour". See also T.K. Earnshaw, "Presumption of Advancement" (1971) 121 N.L.J. 96 and 120.

67. Re Rogers' Question [1948] 1 All E.R. 328 (C.A.); Bull v. Bull [1955] 1 Q.B. 234 (C.A.); Gissing v. Gissing [1970] 3 W.L.R. 255 (H.L.). Even where the property is in the wife's name, the fact that both have contributed tends to rebut the presumption of advancement: Fish v. Fish (1966) 110 Sol.J. 228 (C.A.); Fennell v. Fennell (1966) 110 Sol.J. 707 (C.A.); Falconer v. Falconer [1970] 1 W.L.R. 1333 (C.A.); Latimer v. Latimer (1970) 114 Sol.J. 973 (C.A.); cf. Toghill v. Toghill (1971) 217 E.G. 645 (C.A.). See also the observation of Lord Upjohn in Pettitt v. Pettitt [1970] A.C. 777, 815 (H.L.). This leads to the apparently absurd result that a wife who pays nothing may get the whole interest, whereas a wife who makes a contribution may get an interest in proportion to her contribution: see T.K. Earnshaw (1971) 121 N.L.J. 96 and 120.

68. For example, where the document of title expressly declares the beneficial interests; see para. 1.29, n.53 above.

or a loan, and whether it created a beneficial interest in property, or gave rise to a mere lien.[69] Most homes are purchased by means of a small capital payment, the bulk of the purchase price being secured by a mortgage repayable by instalments out of income. Where the home is conveyed into the name of one spouse the other spouse may derive a beneficial interest not only from direct contributions to the original capital sum but also from subsequent contributions to mortgage repayments.

1.36 Contributions are not limited to direct cash payments. For example, a spouse's unpaid work in the other spouse's business has been held to be a contribution to the business, giving the spouse an interest in the proceeds of sale of the business and in property bought with the proceeds.[70] However, it is less easy to state clearly the rules regarding other forms of contribution. Often both spouses are earning and both make contributions to the household expenses without any specific allocation of responsibilities. For example, one spouse may pay off the mortgage while the other pays other household bills. It is often difficult to determine the exact nature and extent of each spouse's contribution. To meet this situation the Court of Appeal developed two principles. The first was that where both spouses were

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69. A lien may arise from a payment made to discharge an encumbrance or, by agreement, to effect repairs or improvements; as regards contributions by a spouse to improvements, see para. 1.40 below.

70. Nixon v. Nixon [1969] 1 W.L.R. 1676 (C.A.); Muetzel v. Muetzel [1970] 1 W.L.R. 188 (C.A.); Re Cummins The Times, 14 July 1971, p.8 (C.A.).

contributing to the general expenses of the family, this was evidence from which the court could infer an implied pooling agreement or joint venture, and that the spouses should share the beneficial interest in family assets acquired from the pool.[71] The second principle was that where the precise contributions of each spouse could not be calculated, the court should have a discretion to divide the property on an equitable basis. This in practice led to the application of the maxim: "equality is equity".[72] Recent cases went even further. It was held that if the spouses had entered into a joint venture or had pooled resources for the purpose of acquiring a family asset, and each contributed what he or she could, then the property should be shared equally.[73] Some of these decision were difficult to reconcile with the property law principles outlined above.

1.37 The House of Lords has now ruled in two decisions that there are no special rules applicable to husband and wife cases. Their property rights must be determined in accordance with the general rules of property law.[74] A

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71. Rimmer v. Rimmer [1953] 1 Q.B. 63 (C.A.); Ulrich v. Ulrich and Felton [1968] 1 W.L.R. 180 (C.A.); Chapman v. Chapman [1969] 1 W.L.R. 1367 (C.A.); Baker v. Baker (1970) 114 Sol.J. 356 (C.A.).

72. Rimmer v. Rimmer [1953] 1 Q.B. 63 (C.A.); Cobb v. Cobb [1955] 1 W.L.R. 731 (C.A.).

73. E.g. Ulrich v. Ulrich and Felton [1968] 1 W.L.R. 180 (C.A.); Chapman v. Chapman [1969] 1 W.L.R. 1367 (C.A.); Gissing v. Gissing [1969] 2 Ch.D.85 and 105 (C.A.) (reversed on appeal; see below); Baker v. Baker (1970) 114 Sol. J. 356 (C.A.). These special rules applied only to husband and wife and not, for example, to a mistress: Diwell v. Farnes [1959] 1 W.L.R. 624.

74. Pettitt v. Pettitt [1970] A.C. 777 (H.L.) per Lord Morris at 803, Lord Upjohn at 812-813; Gissing v. Gissing [1970] 3 W.L.R. 255 (H.L.) per Viscount Dilhorne at 262, Lord Diplock at 267.

spouse may acquire a beneficial interest in property in the name of the other spouse if there is an express agreement to that effect, or if he or she makes a direct contribution to the purchase price, either to the capital payment or to the mortgage instalments.[75] Regarding other payments for the benefit of the family, their Lordships seemed to be in agreement that such payments would not alone give rise to a beneficial interest.[76] But views were expressed in Gissing v. Gissing to the effect that such payments might give rise to a beneficial interest if they were referable to the acquisition because, for example, of an arrangement between the spouses,[77] or because the spouse making the payments had undertaken certain liabilities of the other spouse at the time of the purchase as a result of which an arrangement could be inferred.[78] Lord Reid's view was that the distinction between direct contributions and indirect contributions might be unworkable and that it should be possible for the court to impute an intention to the parties in certain cases.[79]

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75. See Davis v. Vale [1971] 1 W.L.R. 1022 (C.A.); Smith v. Baker [1970] 1 W.L.R. 1160 (C.A.).

76. E.g. Gissing v. Gissing [1970] 3 W.L.R. 255 (H.L.), Viscount Dilhorne at 263, Lord Diplock at 271.

77. Lord Pearson at 265.

78. Lord Reid at 259-260, Lord Diplock at 270-271; cf. Lord Morris at 261: "The court cannot ascribe intentions which the parties in fact never had".

79. At 259-260. No view was expressed about Nixon v. Nixon [1969] 1 W.L.R. 1676 (C.A.) in which a wife's unpaid work in the husband's business was held to give rise to an interest in the business and in property derived from it. See also Muetzel v. Muetzel [1970] 1 W.L.R. 188 (C.A.); Re Cummins, The Times, 14 July 1971, p.8 (C.A.).

1.38 The House of Lords, in Gissing v. Gissing, also considered the extent of the beneficial interest acquired by a contributing spouse. While agreeing that in cases of doubt the court could apply the doctrine "equality is equity", their Lordships' view was that this maxim had been misused.[80] It did not absolve the court from trying to discover whether any inference could be drawn as to the probable understanding between the spouses concerning the extent of their shares or from trying to ascertain the proportion of each spouse's contribution.[81]

(iii) Contributions to improvements

1.39 In Pettitt v. Pettitt the House of Lords drew a distinction between contributions to the purchase price, and contributions to property in the form of improvements.[82] Two of their Lordships said that a spouse who paid for or carried out improvements to the property of the other spouse, could not acquire a beneficial interest therein in the absence of an express agreement.[83] If, however, a contribution to the mortgage repayments made after the

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80. Lord Reid at 260, Lord Pearson at 265, Lord Diplock at 270.

81. This principle was applied in Latimer v. Latimer (1970) 114 Sol.J. 973; see also Cooke v. Head (1971) 217 E.G. 875.

82. Pettitt v. Pettitt [1970] A.C. 777 (H.L.). See also Muetzel v. Muetzel [1970] 1 W.L.R. 188 (C.A.) (extensions paid for by the husband were regarded as accretions to the respective beneficial interests of the spouses). For earlier cases on improvements, see Appleton v. Appleton [1965] 1 W.L.R. 25 (C.A.); Jansen v. Jansen [1965] P.478 (C.A.); Button v. Button [1968] 1 W.L.R. 457 (C.A.); see now Baker v. Baker (1970) 114 Sol.J. 356 (C.A.).

83. Lord Hodson, at 810-811 and Lord Upjohn, at 817-818, disapproving Jansen v. Jansen [1965] P.478 (C.A.). Lord Reid, at 795, and Lord Diplock, at 823, thought an implied agreement would be sufficient and approved of Jansen v. Jansen; cf. Baker v. Baker (1970) 114 Sol. J. 356.

original acquisition can give rise to a beneficial interest by way of resulting trust, it is difficult to understand why payments in respect of improvements should not also give rise to a beneficial interest. Their Lordships drew attention to the unsatisfactory state of the law and to the need for legislation.[84]

1.40 Accordingly, our Report on Financial Provision in Matrimonial Proceedings[85] recommended that a substantial contribution by a spouse to the improvement of property belonging to the other spouse should give rise to a beneficial interest in that property. That recommendation has now been implemented by the Matrimonial Proceedings and Property Act 1970, section 37. The effect of this section is that there is no longer any need to prove an express or implied agreement. The actual contribution to improvement, provided it is substantial and that there is no contrary agreement, express or implied, creates a beneficial interest for the contributing spouse. The extent of the interest depends on any agreement, or, if none, is such as may seem just to the court.[86]

(iv) The trust for sale

1.41 Where the legal title is vested in two or more persons and the beneficial interest is shared between them, either as a joint tenants or tenants in common, there is

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84. Lord Reid, at 794, 797; Lord Morris, at 805; Lord Hodson, at 811.

85. Law Com. No.25 (1969), paras.55-58.

86. S.37 was applied in Davis v. Vale [1971] 1 W.L.R.1022 (C.A.).

an express or implied trust for sale.[87] The legal owners, as trustees, have full power to deal with the property. A purchaser is absolved from enquiring into or being bound by the interests of the beneficiaries, so long as he deals with two trustees for sale or with a trust corporation; the beneficial interest is converted into an interest in the proceeds of sale.[88]

1.42 In the case of a matrimonial home the legal estate is sometimes vested in one spouse while the beneficial interest is shared between them; for example, when the other spouse has contributed to the purchase price, or to improvements. The courts have assumed or held that where the legal estate is vested in one spouse, and the beneficial interest is shared, the spouses become beneficial tenants in common under a trust for sale.[89] But the overreaching provisions under which the beneficial interests attach to the proceeds of sale apply only if the trustees for sale are two or more individuals or a trust corporation;[90] it is provided that the proceeds of sale must not be paid to fewer than two persons as trustees for sale (except where the trustee is a trust corporation). The statutory powers under which a trustee may give a valid receipt for the proceeds of

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87. Law of Property Act 1925, ss. 34(2) and (3), 36(1). For comments on the suitability of applying the trust for sale to husband and wife, see Bedson v. Bedson [1965] 2 Q.B. 666 (C.A.) per Lord Denning M.R. 678 ff. See also Bull v. Bull [1955] 1 Q.B. 234 (C.A.); Jones v. Challenger [1961] 1 Q.B. 176 (C.A.).

88. Law of Property Act 1925, ss.2 and 27.

89. Re Rogers' Question [1948] 1 All E.R. 328 (C.A.); Cook v. Cook [1962] P.235 (C.A.); cf. Bull v. Bull [1955] 1 Q.B. 234 (C.A.). Comment: Rudden "The Wife, the Husband and the Conveyancer" (1963) 27 Conv. 51. cf. Megarry & Wade (3rd ed., 1966) p.423; Emmet on Title (15th ed., 1967) p.383; Settled Land Act 1925, s.36(4).

90. Law of Property Act 1925, ss.2 and 27.

sale do not apply to a sole trustee for sale.[91] A purchaser who dealt with two trustees would be protected by the overreaching provisions. But if there were only one trustee, it is uncertain to what extent the purchaser would be affected by actual or constructive notice of the beneficiaries' interests. It has been held that he is not bound to make enquiries simply because the vendor's spouse is in occupation, and that on conveyance he gets a good title free of any interest of that spouse of which he had no notice.[92] What is not clear is whether, if he has actual notice of the spouse's interest, (a) the legal estate vests in him at all, or (b) he takes the legal estate but subject to that interest.[93]

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91. Law of Property Act 1925, s.27(2); Trustee Act 1925, s.14; Waller v. Waller [1967] 1 W.L.R. 451.

92. Caunce v. Caunce [1969] 1 W.L.R. 286. There may be an obligation to make enquiries where the spouse in occupation has been deserted by the vendor: ibid., pp. 293, 294; Hunt v. Luck [1902] 1 Ch. 428, 432; Nat. Prov. Bank Ltd. v. Hastings Car Mart [1964] Ch. 665 (C.A.). cf. Hodgson v. Marks [1971] 2 W.L.R. 1263 (C.A.).

93. See Megarry & Wade (3rd ed. 1966) pp. 154, 386, 1056; Emmet on Title (15th ed. 1967) pp. 383-384; Rudden, loc. cit.;J.F. Garner, " A Single Trustee for Sale" (1969) 33 Conv. 240; Theodore B.F. Ruoff, "Protection of the Purchaser of Land under English Law" (1969) 32 M.L.R. 121, 131. In the case of registered land, however, the purchaser is protected once he becomes registered with an absolute title even if there is only one trustee for sale. The beneficiary cannot register and has no overriding interest; cf. Hodgson v. Marks [1971] 2 W.L.R. 1263 (C.A.), a case concerning registered land in which it was held that a beneficiary in occupation under a bare trust had an overriding interest, which under s.70(1)(g) of the Land Registration Act 1925 could prevail against a purchaser who had become registered. See D.J. Hayton "Overriding Rights of Occupiers of Matrimonial Homes" (1969) 33 Conv. 254.

(v) Restrictions on the power to sell

1.43 Under English law a spouse who has the legal title to the matrimonial home is not, merely by virtue of the marriage, subject to any restrictions on his power to sell or to dispose of the property. He can sell or charge the property without the consent of the other spouse.[94] Even if the other spouse has a beneficial interest in the property, it is doubtful whether, and to what extent, this affects the power of sale.[95] The beneficiary might be able to obtain an injunction to prevent sale by the other spouse as sole trustee.[96]

1.44 If a spouse had warning of an impending sale it might be possible at common law to prevent it by an injunction to protect occupation rights.[97] The Matrimonial Homes Act 1967 strengthens the position of the spouse with no legal title by making his or her rights of occupation a charge which may be protected by registration.[98] If

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94. In the case of registered land, where the home was originally held in joint names a restriction may be entered on the register which will affect the power of a sole survivor to deal with the property, but it is uncertain whether a beneficiary could require an entry to be made without the concurrence of the registered proprietor: Land Registration Act 1925, ss.49(1) (d) and 56; Land Registration Rules 235-236; Curtis and Ruoff, The Law and Practice of Registered Conveyancing (2nd ed. 1965) pp.476-478.

95. Para.1.42 above.

96. Waller v. Waller [1967] 1 W.L.R. 451. See also n. 94 above.

97. Lee v. Lee [1952] 2 Q.B. 489 (C.A.).

98. Matrimonial Homes Act 1967, s.2(6) and (7). A spouse with a beneficial interest is not precluded from rights of occupation under the Matrimonial Homes Act 1967: s.1 (9), inserted by the Matrimonial Proceedings and Property Act 1970, s.38.

registered, the rights of occupation bind subsequent purchasers or mortgagees. In practice, therefore, registration is effective to prevent a disposition of the home without the consent of the other spouse. However, this protection cannot avail a spouse whose rights of occupation have been terminated by court order or otherwise, even if that spouse retains a beneficial interest in the home. Although a spouse with continuing rights of occupation may safeguard the position by registration even if he or she has no beneficial interest in the home, a spouse with a beneficial interest but no occupation rights has no means of protecting that beneficial interest against adverse dealings by registration. In our view this is unsatisfactory. In general, a beneficiary under a trust for sale has no need to protect the interest by registration. But where one spouse is sole trustee and the other spouse has a beneficial interest there may be a temptation for the sole trustee (who may not even be aware that legally the other spouse is entitled to part of the beneficial interest) to dispose of the whole proceeds of sale for his own benefit. In this situation, there seems to be a case in favour of allowing some form of registration - we shall return to this point later.[99]

(b) Ownership on breakdown of marriage and on divorce

1.45 Breakdown of marriage does not itself alter the existing interests of the spouses or create any new interest in property.[100] Nor does the court's jurisdiction under the Married Women's Property Act 1882, section 17, give the court discretionary power to vary established rights.[101]

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99. Para. 1.104.

100. Pettitt v. Pettitt [1970] A.C. 777 (H.L.), per Lord Reid at 793, Lord Morris at 801, Lord Upjohn at 811-813.

101. Ibid.

But on granting a decree of divorce, judicial separation or nullity, the court has power to vary ante-or post-nuptial settlements and to order the transfer or settlement of a spouse's property for the benefit of the other spouse or children.[102] Among the factors to be taken into account by the court are the means, needs and conduct of the parties, their standard of living, their ages, the duration of the marriage, and the contributions made by each to the welfare of the family, including any contrition made by looking after the home or caring for the family.[103] Because of these powers any dispute between the parties as to the beneficial interest in the matrimonial home is of reduced importance. Having reached a provisional view as to the spouses' rights, in accordance with the principles outlined above, the court may vary the spouses' interests, may settle the home on one or both spouses or on the children, or may transfer the home from one spouse to the other, provided, in each case, that this is an appropriate way of ordering financial provision.

(c) Ownership after the death of a spouse

1.46 If the spouses share the beneficial interest in the home jointly, then, on the death of one spouse, the survivor automatically succeeds to the whole interest in the home. There is no power to deal with a beneficial joint interest by will, and it does not form part of the estate although it may be taken into account for the purpose of estate duty. It is, of course, open to either party to sever the beneficial joint tenancy during joint lives, in which case the beneficial interest would be held by the spouses as tenants in common. If the spouses shared

102. Matrimonial Proceedings and Property Act 1970, s.4.

103. Matrimonial Proceedings and Property Act, s.5(1).

the home as tenants in common, or if the deceased was the sole owner of the home, the interest held by the deceased can be disposed of by will or passes on intestacy. If the deceased died intestate, then, whether the deceased was sole owner or a tenant in common, the survivor may require that the deceased's interest in the matrimonial home be appropriated in satisfaction of his or her interest in the estate.[104]

1.47 If the deceased made a will disposing of his or her interest in the home to anyone other than the surviving spouse, the survivor has only a limited remedy. If the deceased failed to make reasonable provision for the maintenance of the survivor, the latter may apply for an order under the Inheritance (Family Provision) Act 1938. The court has no power at present to allocate the home or any other item of property to a successful applicant, though it may make an order affecting indirectly the right to occupy the home.[105] We make proposals to give the court such power in a later part of the Paper.[106]

(d) Tenancies

1.48 Where the matrimonial home is held by one spouse under a protected tenancy to which the Rent Acts apply, the other spouse has special rights which have been considered above.[107] The right of a protected tenant against the landlord to remain in possession cannot strictly be described as an ownership right, since it is not transferable for value. Nevertheless, as between the spouses a protected tenancy is an asset of considerable value which can be

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104. Intestates' Estates Act 1952, Second Schedule.

105. Re Blanch [1967] 1 W.L.R. 987, 992.

106. Para. 3.28.

107. These include rights of occupation, the right to apply for a transfer of the tenancy on a divorce, and succession rights.

transferred on divorce, and which carries succession rights on death.

(e) Summary

1.49 This survey shows that the present law governing ownership of the matrimonial home falls far short of the ideal. The property law is highly complex and technical; in its application to the matrimonial home it is also artificial since it takes little account of the realities of family relationships. The "trust for sale", which applies whenever the beneficial interest is shared, not only seems inappropriate but also is liable to confuse the layman when applied to a home which in fact is to be retained for occupation. The concept of separate property itself does not seem apt when applied to property which is jointly used, and to a situation where there is often a mingling of assets and where restraint is necessary in the interests of the other spouse and the family. Although great emphasis is placed on seeking the intention or agreement of the spouses, it is hard not to agree with Lord Hodson that:

> "The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque."108

1.50 The artificiality and technicality of the law is not counterbalanced by certainty in application. Even after the House of Lords decision in Gissing v. Gissing it is difficult to state clearly the limited circumstances in which payments by a spouse for the benefit of the family will be regarded as contributions to the acquisition of the

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108. Pettitt v. Pettitt [1970] A.C. 777, 810 (H.L.); see also Lord Reid in Gissing v. Gissing [1970] 3 W.L.R. 255, 260. Kahn-Freund, in Matrimonial Property: where do we go from here? points out the difficulties in making the ownership of property depend on intentions which were never in fact formed by the parties.

home. Another cause of uncertainty is the need to disentangle the transactions of the spouses, which may extend over many years, to calculate the exact proportions of their contributions. Further, if the house is in the name of one spouse, and the other has become entitled to a beneficial interest in it, there may be doubt in the event of a sale as to the respective rights of the beneficiary spouse and a third party purchaser.

1.51 No doubt these technicalities and uncertainties could be reduced within the framework of the present law. But there is a more serious objection. It is said that any law based on financial contribution necessarily applies inequitably between husband and wife because their different roles in marriage do not give them equal opportunities to make financial contributions to the acquisition of the home. It is said that it is unfair and unrealistic to concentrate on financial contribution and to take no account of a spouse's efforts in caring for the home and family.[109] This argument implies that a completely new basis is necessary for determining ownership rights. Before considering whether any other system might be potentially fairer, we look at how the matrimonial home is dealt with in certain other countries.

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109. We have already referred to another inequality in the present law - the presumption of advancement, which applies in favour of a wife, but not in favour of a husband: paras. 1.31-1.34 above.

2 OTHER SYSTEMS OF LAW

1.52 The provisions considered below dealing with the ownership of the home and the protection of the spouses' interests in the home in certain other countries are grouped as follows:

(a) Provisions under which the spouses' interests in the home are determined by the court on a discretionary basis.

(b) Provisions which raise a presumption as to the spouses' interests in the home.

(c) Systems for registering the home as a joint home.

(d) Provisions under which a spouse is restrained from dealing with the home or its contents without the consent of the other spouse.

(a) Discretionary power: New Zealand

1.53 New Zealand has introduced by legislation the discretionary power with regard to the matrimonial home which English judges at one time attempted to derive from from section 17 of the Married Women's Property Act 1882.[110] The New Zealand Matrimonial Property Act 1963,[111] section

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110. In Hine v. Hine [1962] 1 W.L.R. 1124, 1128 (C.A.), Lord Denning M.R. said of s.17 that "its discretion transcends all rights, legal or equitable". It has now been held by the House of Lords that s.17 is merely procedural: Pettitt v. Pettitt [1970] A.C. 777 (H.L.).

111. The Act has been amended several times, most recently by the Matrimonial Property Amendment Act 1968. Application may be made after divorce, as well as after the death of a spouse, s.5(7). See generally Inglis, Family Law, Vol. I (2nd ed. 1968) pp.249-266; Sim "Husband and Wife - The New Look as to Ownership of Property" [1968] N.Z. L.J. 182, 213.

5(1) is similar to section 17 of the English Act in providing a procedure for settling property disputes between husband and wife at any stage of a marriage. However, under subsection (3) the court may make such order as appears just "nothwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property". Where the case concerns a matrimonial home or its proceeds of sale the court must "have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever)".[112] The court may make an order in favour of a spouse notwithstanding that he or she made no financial contribution to the property "or that his or her contribution in any other form was of a usual and not an extraordinary character".[113] But the court may not make an order which would defeat any common intention of the spouses.[114] The conduct of the parties is not relevant unless it is related to the acquisition of the property in dispute or to its extent or value.[115] It has been held that the Act gives the court a wide discretion to interfere with legal or equitable rights on the grounds of fairness or justice.[116] In almost every case there is likely to be some contribution by each spouse, but the court can act even in the absence of contribution.

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112. s.6(1).

113. s.6(1A) (inserted in 1968); see Maxwell-Stewart v. Maxwell-Stewart [1970] N.Z. L.J. 352.

114. s.6(2).

115. s.6A (inserted in 1968).

116. e.g. Sutton v. Sutton [1965] N.Z.L.R. 781; Hofman v. Hofman [1967] N.Z.L.R. 9 (C.A.); Edwards v. Edwards [1970] N.Z.L.J. 247; Maxwell-Stewart v. Maxwell-Stewart [1970] N.Z.L.J. 352.

1.54 On a decree of divorce, nullity or judicial separation, the court has additional powers. It may make an order as to occupation of the home or, where both parties have made a substantial contribution, an order as to the sale or vesting of the home in the parties as tenants in common.[117] It has been held that these powers should be regarded as independent of those referred to above, and it is possible that conduct may be given greater weight in matrimonial proceedings.[118]

(b) Presumptions concerning the matrimonial home: Victoria

1.55 Section 161 of the Marriage Act 1958 (Vic.)[119] is also an extended version of the English Married Women's Property Act 1882, section 17, and can be compared with the New Zealand provisions referred to above. The judge may make such order as he thinks fit; however, he must not exercise the power so as to defeat any common intention which he is satisfied was expressed by the husband and wife, and must not take into account any conduct which is not directly related to the acquisition of the property or to its extent or value.[120] An important provision is section 161(4)(b):

> "A husband and wife shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed, in the absence of sufficient evidence of intention to the contrary and in the absence of any special

117. Matrimonial Proceedings Act 1963, ss.57,58.

118. See Pay v. Pay [1968] N.Z.L.R. 140 (C.A.) at 149, 153; see comments by P.R.H. Webb, "Recent Developments in the Law of Matrimonial Property - A Good Deal for Wives?" (1968) 3 Recent Law (No.4) 98, 107-108.

119. Substituted by the Marriage (Property) Act 1962 (Vic.), s.3. On common intention see Gallo v. Gallo [1967] V.R. 190.

120. s.161(4)(a); cf. New Zealand Act, s.6A, para. 1.53 above.

circumstances which appear to the Judge to render it unjust so to do, to hold or to have held as joint tenants so much of any real property in question as consists of a dwelling and its curtilage (if any) which the Judge is satisfied was acquired by them or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home."

1.56 The decisions under section 161 have mainly turned on whether, on the facts, there was "sufficient evidence of intention to the contrary" or "any special circumstances which appear ... to render it unjust". Examples are as follows:

(i) Where the husband bought the house in his name, assumed liability for the whole price and intended at all times to exclude the wife from any share, it was held that there were no special circumstances rendering the presumption unjust, but in the circumstances there was sufficient intention on the part of the husband to rebut the presumption.[121]

(ii) The husband bought a matrimonial home in his name from a fund deriving from the sale of a business to which the wife had contributed by unpaid work. He later said he intended that he should have sole proprietary rights. It was held there was no sufficient intention to rebut the presumption as he did nothing as the time of purchase

121. Moore v. Moore [1965] V.R. 61.

> to show he intended to retain the whole beneficial interest; he may have had no intention as to what was to happen on breakdown.[122]

1.57 The cases suggest that it would be difficult to rebut the presumption where both spouses had made some contribution. However, the fact that one spouse had made no contribution would not of itself amount to a special circumstance, though it might support the allegation by a spouse of an intention to exclude sharing. The view was expressed in one case that even if the presumption were rebutted the court could give effect to the joint tenancy under subsection (3), under which the court may make such order as it thinks fit.[123] In another case it was held that where the presumption could not apply, because the property was not acquired as a matrimonial home in the terms of the subsection, the court could exercise its discretion under subsection (3) as to how the home should be divided.[124]

(c) Joint homes law: New Zealand

1.58 The New Zealand Joint Family Homes Act 1964[125] introduced a system similar to the homestead laws of some American states and Canadian provinces.[126] Under the New Zealand Act the spouses, or either of them, may settle

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122. Hogben v. Hogben [1964] V.R. 468. It was also held that there were no special circumstances.

123. Hogben v. Hogben [1964] V.R. 468.

124. Pate v. Pate (No.2) [1970] V.R. 97; (1970) 44 A.L.J. 392.

125. The original Act was in 1950. See Inglis, Family Law, Vol. I (2nd ed. 1968) pp. 266-272.

126. The first homestead laws were introduced in Texas in 1893. See generally, Alan Milner, "A Homestead Act for England?" (1959) 22 M.L.R. 458; Crane & Levin, "The Rationalisation of Family Property Law" (1966-67) 9 J.S.P.T.L. 258.

land on themselves as a joint family home and apply to have the settlement registered. Creditors are entitled to enter a caveat, which will prevent registration of the settlement until the claim is settled. Upon registration the spouses become the legal and beneficial owners as joint tenants, subject to any mortgages or encumbrances, and become jointly liable for the performance of covenants. During their joint lives they have equal rights as to the possession, use and enjoyment of the property. Neither spouse may dispose of his or her undivided share, though both may concur in a sale or disposition of the home itself. While the settlement remains registered, the interests of the husband and wife are unaffected by bankruptcy or assignment for the benefit of creditors.[127] On the death of one spouse the survivor becomes the sole proprietor. There is estate duty exemption up to $ 8,000 (N.Z.).

1.59 The interests inter se of the spouses in the joint home are subject to the discretionary powers of the court under the Matrimonial Property Act 1963, as amended.[128] Section 6(2) directs the court not to defeat any common intention of the spouses. A registered settlement is not necessarily conclusive of the spouses' interests, unless it is regarded as expressing the common intention of the parties.[129]

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127. Creditors or assignees in bankruptcy may apply for cancellation of registration or sale on terms laid down: ss. 16-20.

128. See para. 1.53 above.

129. Gurney v. Gurney [1967] N.Z.L.R. 388; Maxwell-Stewart v. Maxwell-Stewart [1970] N.Z.L.J. 352; see also Inglis, Family Law, Vol. I (2nd ed. 1968) pp. 255-256, on the meaning of "common intention".

(d) Restraint on disposition of the home

1.60 In some countries the law seeks to protect the interests of the non-owner spouse by restricting the power of the owner spouse to deal with the home. These restrictions operate during the marriage, whatever regime applies to the spouses' property. In Denmark, for example, the spouse who has the title to the matrimonial home may not sell or mortgage it without the consent of the other spouse.[130] Most property is registered, and the marriage certificate may be entered in the real property register, to give notice to third party purchasers. Even in the absence of registration, a purchaser will take a valid title only if he acted in good faith; if, as is likely, the normal inspection revealed that the property was being used as a matrimonial home, there would not be good faith.

1.61 In France, neither spouse may dispose of the matrimonial home or its contents without the consent of the other spouse.[131] The spouse whose consent has not been obtained may apply for the transaction to be avoided (action en nullité) within one year from the date of discovery, but no action may be brought more than a year after dissolution of

130. See Pedersen, "Matrimonial Property Law in Denmark" (1965) 28 M.L.R. 137, 140-1; Norwegian, Swedish and Dutch Law are similar to Danish Law. In Sweden, all land is registered, and the person requesting registration must produce personal documentation. The registering authority is responsible for seeing that all consents have been obtained: Crane & Levin, "The Rationalisation of Family Property Law" (1966-67) 9 J.S.P.T.L. 238. In Germany, if the home is the sole asset of a spouse, the consent of the other spouse must be obtained before registration of the sale: BGB 1365.

131. C.C. 215, al.3 (introduced in 1965); see Amos & Walton's Introduction to French Law (3rd ed. 1967) Appendix, pp. 382-383. Proposals to introduce similar legislation in Quebec have been made by the Committee on the Law of Persons and the Family, Civil Code Revision Office: Report on the Protection of the Family Residence, XII, 1971.

of the matrimonial regime. If the home is held on a lease, rights under the lease are to be regarded as belonging to both spouses.[132] The court which grants a divorce or judicial separation may assign the lease to either spouse, taking into account the family interests, and subject to the right of the other spouse to compensation.

3 ON WHAT PRINCIPLE SHOULD OWNERSHIP BE DETERMINED?

1.62 We have already pointed out that the present system, under which ownership rights depend on financial contribution and on the operation of certain presumptions, has several disadvantages. These arise partly from the artificiality of the rules and from their uncertainty in application and, more especially, from the alleged failure of the law to apply equitably between spouses.[133] In this section we consider the following alternative systems which could be introduced into English law for determining the ownership of the matrimonial home:

(a) Registration of co-ownership

(b) Discretionary power

(c) Presumption of co-ownership

(d) Automatic co-ownership.

Three of the four systems discussed are based on foreign law provisions set out in the previous section. Registration of co-ownership can be compared with the New Zealand Joint Family Homes Act 1964. The system of discretionary power is in some respects similar to the New Zealand version of section 17 of the Married Women's Property Act 1882. The presumption of co-ownership is based on the law of Victoria. The system of automatic co-ownership put forward for consideration is, in effect, a form of community of property limited

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132. C.C. 1751 (law of 4 August 1962).

133. See paras. 1.49-1.51 above.

to the home. The Paper also considers a new matrimonial home trust, some elements of which could be implemented irrespective of whether compulsory co-ownership is introduced.

(a) Registration of co-ownership

1.63 Under the New Zealand Joint Family Homes Act 1964,[134] if a home is registered as a joint family home, the spouses become legal and beneficial joint tenants. There are incentives to register, including a measure of exemption from estate duty. If a system of registration were introduced in England, what incentives could be offered? One possibility would be to provide that if a family home were registered in joint names it should receive a degree of protection from creditors.[135] It would be necessary, as in New Zealand, to avoid prejudicing existing creditors, and to consider whether registration of a home in joint names should be regarded as a voluntary transaction void against the trustee in bankruptcy.[136] There may be arguments in favour of introducing measures to protect certain family property against creditors.[137] This, however, might raise issues wider than those covered in this part of the Paper, since it would not necessarily follow that such measures should be limited to cases where the property concerned was owned jointly. Similar arguments apply to other incentives for registration which could be suggested.

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134. See paras. 1.58-1.59 above.

135. Such protection is often part of the homestead laws in the United States.

136. Bankruptcy Act 1914, s.42; see the bankruptcy provisions under the New Zealand Joint Family Homes Act, ss. 16-20.

137. See Report of the Committee on the Enforcement of Judgment Debts (Payne Committee) Cmnd. 3909, 1969, para. 675, where it is proposed that certain goods should be exempt from execution.

For example, if it were proposed that estate duty in respect of the home should be postponed until the death of the survivor, or that a matrimonial home should be exempt from estate duty it could be argued that the postponement or exemption should not be limited to jointly owned homes. These latter suggestions also involve decisions as to fiscal policy which go beyond the scope of this Paper. The benefits of estate duty concessions or exemptions would affect only those estates over £12,500.[138]

1.64 The real difficulty in attempting to introduce joint ownership of the home through a system of registration is that even if incentives could be offered to induce registration it would not necessarily follow that all homes would be registered. The owner spouse would not be bound to take advantage of the incentives, and a non-owner spouse could not require registration. If the owner spouse declined to register he might effectively deprive the non-owner spouse not only of a joint interest, but also of whatever other benefits registration would bring. In the absence of incentives, a system of registration of the matrimonial home in joint names would not represent any great advance on the present law, since spouses are free, if they agree, to put their home in their joint names and to share the beneficial interest in whatever proportions they think fit. Even if there were incentives, in our view to allow a spouse's interest in the home to depend on an act of registration by the other spouse would not go far enough.

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138. Only 10% of estates exceed £12,500; of these a high proportion include residential property: 111th Report of Commissioners of H.M. Inland Revenue, 31 March 1968, Cmnd. 3879. In a House of Commons Written Answer (H.C. Debs. 4 May 1971, col. 317) it was said that the cost to the Inland Revenue of exempting the interest in the matrimonial home left to the surviving spouse would be £40 million per annum. The cost of postponing payment of duty until the death of the survivor was said to be £150 million, but this estimate was not limited to duty on the home.

(b) Discretionary power

1.65 Another possible reform would be to confer on the court wide discretionary powers to determine the ownership of the home, taking into account not only financial contributions but also contributions to the welfare of the family and other factors. In other words, the court would have a general discretion to decide what was just and equitable between the parties. This can be compared with the discretionary powers granted to the New Zealand court, which were considered above.[139] The objection that the present law is inequitable because of its dependence on financial contribution would be overcome.

1.66 On the other hand, although a wide discretionary power may be appropriate for re-allocating or transferring property when a marriage breaks down or terminates, it would not initially establish definite proprietary rights. Until the court reached a decision it would be uncertain whether a spouse who had no legal title was entitled to any beneficial interest.

1.67 A spouse would be unlikely to make an application to the court to exercise its discretionary power unless the marriage had broken down, or unless the other spouse had died. Where breakdown is followed by a decree of divorce, judicial separation or nullity, the court now has wide powers to transfer property, including the home, from one spouse to the other.[140] In exercising this power, which is part of the general power to order financial provision, the court must have regard to certain factors including the means, needs and conduct of the parties, and the contribution by the spouses to the welfare of the family, including any contribution

139. See New Zealand law, paras. 1.53-1.54 above.

140. Matrimonial Proceedings and Property Act 1970, s.4. In a later part of this Paper it is proposed that the court should have similar powers under its Inheritance (Family Provision) Act 1938 jurisdiction: para.3.28.

made by looking after the home or caring for the family.[141] It could be argued that in view of these powers it is unnecessary to introduce an additional power to decide the ownership of the home on discretionary grounds at some other stage, between breakdown and divorce (or even after divorce). The principles on which the discretion would be exercised would overlap those relevant to financial provision; this could lead to conflict and even greater uncertainty.

1.68 To summarise, it seems that although a discretionary system might introduce greater justice, it would do so at the cost of certainty. The question is whether a spouse's interest in the matrimonial home should depend on discretionary factors to be assessed by the court, or whether it should depend on fixed principles. If it is felt that discretionary powers would leave too much uncertainty, and that the present principle of financial contribution is potentially unfair, then consideration should be given to creating for each spouse a direct interest in the home which does not depend on discretionary factors, but which arises from the marriage relationship itself.

(c) Presumption of co-ownership

1.69 One such way of changing the present ownership rules would be to introduce a presumption that the beneficial interest in the matrimonial home is shared by the spouses, either as joint tenants or tenants in common. The presumption we envisage could be compared with section 161(4)(b) of the Marriage Act 1958 (Victoria) referred to earlier.[142] Under that Act, however, the presumption operates only

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141. s.5(1)(f).

142. Paras. 1.55-1.57 above.

in respect of proceedings between husband and wife under section 161. In our view this may be too narrow. If there were to be a presumption that the beneficial interest in the home was shared it should operate in all circumstances, in the same way as the presumption of advancement. There might be cases where the issue was raised between a spouse and a third party, for example, in relation to estate duty.

1.70 A legal presumption takes effect in the absence of evidence sufficient to rebut it, and the cases under the above Act[143] have been concerned mainly with the question whether the presumption was rebutted by "intention to the contrary" or by "special circumstances which render it unjust". If a similar presumption were introduced in English law, what factors would be relevant to the decision whether it had been rebutted? An express or implied agreement or common intention of both spouses that co-ownership should not apply would probably be regarded as sufficient. In addition it could be provided, as in Victoria, that the presumption would not apply if, having regard to all the circumstances, it appeared to the court unjust. This would, of course, introduce an element of discretion into the matter. The essential difference between this system and the discretionary system considered above is that here the court would start from the presumption that the home was jointly owned; the discretion would be limited to considering whether the presumption of co-ownership had been rebutted. In the absence of any evidence, the presumption would operate. However, even if limited in this way, the discretionary element would involve a degree of uncertainty. An alternative would be to allow no ground for rebuttal other than an express or implied agreement or common intention

143. Para. 1.56 above.

of the spouses. The court would, of course, retain its discretionary powers to deal with property in the event of a divorce, and, in more limited circumstances, under its family provision jurisdiction.

1.71 Quite apart from the question of rebuttal there are other problems in applying a presumption of co-ownership.[144] Would it apply to the most recent home, or to every home? Would it apply to a home acquired by gift or inheritance? Would the beneficial interest of a spouse attach to the proceeds of sale? How far would third parties be bound? Such problems are inevitable in any proposal to change the basic rules for determining the beneficial ownership of the home. They will be considered in more detail below, in relation to co-ownership by operation of law.

(d) Co-ownership by operation of law

1.72 Another way of changing the present law would be to provide that the matrimonial home should automatically belong to both spouses. The beneficial interest of each spouse would be determined not by discretionary principles, nor by a rebuttable presumption, but by fixed rules. We will refer to this system as co-ownership by operation of law. Co-ownership would be a substitute for the present rules concerning contribution and would avoid the uncertainty of discretion. It would give each spouse an interest in the home by virtue of the marriage relationship itself, without the need for any financial contribution or for any enquiry into the circumstances. Whoever paid, and whoever held the legal estate, both spouses would have the same beneficial interest in the home.

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144. In Victoria, the presumption applies only to property which was acquired by the spouses during or in contemplation of their marriage for occupation as their matrimonial home: Marriage Act 1958, s.161(4)(b).

1.73 The arguments in favour of co-ownership are that it would eliminate the uncertainty associated with discretionary powers, and that it would ensure that each spouse had a share in an important family asset,[145] even if one spouse had not been able to make a financial contribution. There would be no need to enquire into past transactions to establish the extent of any financial contribution. No burden of proof would be imposed on either spouse to establish or to rebut co-ownership; there would therefore be no need to have recourse to the court for this purpose. Since for a great many families the home is the only substantial asset, co-ownership would, in effect, impose a form of community or sharing limited to the principal family asset.[146]

1.74 On the other hand, there are certain arguments against co-ownership. An automatic rule cannot take account of all special circumstances. The rules could exclude sharing in specified cases (for example, where the home was inherited property, or business premises) but could not hope to cover every case where sharing the home might appear unfair. For example, should a wife who had persistently neglected her duties, and who had finally deserted the home, be entitled to a share in it? Should a spouse who had substantial assets of his own, which need not be shared, be entitled to a share in the other spouse's only asset, the home? Should the home be shared where the

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145. Subject to the court's power to deal with property on granting a divorce.

146. In Unhappy Families, the report of a Working Party set up by the Women's National Advisory Committee of the Conservative and Unionist Party, it is recommended that on termination of marriage the wife should have a statutory right to half the proceeds of sale of the matrimonial home subject to certain provisos (No. 14, p.40).

marriage had lasted only a short time, or where the home had been owned by one spouse before marriage?

1.75 Another argument against co-ownership is that it would promote "community" or sharing only where there was in fact a matrimonial home. If a husband chose to invest in a home, his wife would benefit from co-ownership; but if he chose to invest in other property while living in rented accommodation, she might get no benefit.[147] Automatic co-ownership might well act as an inducement to a spouse who did not want to share to refrain from buying a house. This is both an argument against co-ownership and an indication of its limitations, which could be avoided only by introducing sharing on a wider basis. The arguments for against doing so are considered in Part 5 of the Paper (Community of Property). The advantages or otherwise of sharing just one asset, the home, must depend to some extent on the way the system would operate, and to this we now turn. Some of the problems considered in relation to automatic co-ownership would also be relevant to co-ownership by presumption.

147. If the matrimonial home were held under a tenancy protected by the Rent Act 1968, the tenant's spouse would have succession rights, and the right to apply for a transfer on a divorce: see paras. 1.19 ff., 1.25 ff. and 1.48 above.

4 CO-OWNERSHIP OF THE MATRIMONIAL HOME

(a) Scope of co-ownership: The matrimonial home

1.76 The term "co-ownership" is used in this Paper to describe a system under which in the absence of an express agreement the spouses would share automatically the beneficial interest in the home. Before a principle of co-ownership could be introduced it would have to be decided when and in what circumstances it should operate. Our preliminary view is that it should apply to both freehold and leasehold property,[148] and that, as under the Matrimonial Homes Act 1967, section 1(8), it should apply only when the property was occupied as the matrimonial home. One of the spouses must have a beneficial interest in the home, and co-ownership would attach to that beneficial interest.

1.77 If a co-ownership principle were implemented it should, in our view, apply to matrimonial homes already owned at the date when the new law came into force, as well as to those acquired thereafter. If existing homes were excluded it would be many years before the principle applied to all homes, and we think it would be undesirable to create distinctions between married couples. Obviously, there would have to be a suitable transitional period to allow spouses to arrange their affairs, for example, by contracting out. It would be very important to ensure wide publici for a new law which potentially could affect more than half the married couples in England and Wales.

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148. The extension of co-ownership to such items of personal property as caravans or boats would need to be considered, but we do not go into that at this stage.

(b) The interests of the spouses

1.78 The effect of co-ownership would be that a spouse's beneficial interest in the matrimonial home would be shared between the spouses. If the home were held on trust for one spouse,[149] or for one spouse and a third person, co-ownership would attach to the beneficial interest of the spouse, but would not affect the third party's beneficial interest. If one spouse had a legal estate in the home as well as a beneficial interest he or she would be regarded as a trustee for both spouses. Third parties who held the legal estate for the benefit of one spouse would become trustees for both spouses.

1.79 Automatic co-ownership would also apply, in principle, where the beneficial interest in the home was already shared by the spouses as joint tenants or tenants in common, whether or not the legal estate was vested in joint names. However, if there were an agreement between the spouses to hold their beneficial interests in a certain way, this might amount to a variation or exclusion of some of the terms of co-ownership.[150] Proposals made below concerning the matrimonial home trust,[151] could apply whenever the beneficial interest in the home is shared, whether or not co-ownership applies.

1.80 How should the beneficial interest be shared under the co-ownership principle? Under present law beneficial ownership in property can be shared by two persons either as joint tenants or as tenants in common. Under a beneficial joint tenancy both spouses have the same interest in the home during their joint lives. On the death of one spouse the survivor becomes entitled to the whole beneficial

149. For special rules concerning life interests, see below, para. 1.101.

150. As to contracting out, see para. 1.86 below.

151. Para. 1.115 ff.

interest. A beneficial joint tenant may at any time during joint lives sever the joint tenancy by notice to the other party. The effect of severance is that each becomes entitled to a "separate" half interest which may be disposed of by will or otherwise; the spouse who dies first may then leave his or her interest to the other spouse or to a third person. But he or she has nothing that can be disposed of by will unless there has been a severance. A joint tenancy cannot be severed by will.

1.81 Under a beneficial tenancy in common, each spouse has a "separate" share,[152] which can be dealt with or disposed of independently during life or by will. During marriage there is little difference in effect between this and a severable joint tenancy. On breakdown or divorce the court has in either case the same powers to deal with the home. On the death of a spouse, however, there is no automatic survivorship in the case of a tenancy in common. A spouse is free to leave his or her interest to the other spouse or to anyone else. This is the principal difference between a tenancy in common and a joint tenancy. Another difference is that tenants in common may share the beneficial interest in any proportions, such as $\frac{2}{3}$-$\frac{1}{3}$, or $\frac{1}{4}$-$\frac{3}{4}$, though it is usual for the shares to be equal.

1.82 It seems clear to us that under automatic co-ownersh neither spouse should have a greater interest in the home than the other, at least during the marriage. In deciding whether co-ownership should be implemented through a joint tenancy, a tenancy in common or by some other means, there are two principal questions to consider.

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152. See the comments of Lord Denning M.R. in Bedson v. Bedson [1965] 2 Q.B. 666, 678 (C.A.). See also Jones v. Challenger [1961] 1 Q.B. 176 (C.A.), at 183-184, per Devlin L.J.

(i) Power to dispose

1.83 Under present law, a beneficial tenant in common has power to dispose of his or her beneficial interest by inter vivos disposition or by will. A beneficial joint tenant, by severance during his or her lifetime, can acquire the same power. Should either spouse be entitled to dispose unilaterally of his or her interest under co-ownership during joint lives? It would, in our view, be inconsistent with the purpose of the proposals to allow such a disposition without the consent of the other spouse, at least while the marriage subsists. It would be wrong to allow a third party to be brought in and to acquire the same rights as a spouse to occupy the home. Even when the marriage has broken down, it is our provisional view that neither severance nor sale of the interests should be permissible unless both spouses consent or the court gives leave.

(ii) Survivorship

1.84 Should co-ownership do more than give each spouse an equal beneficial interest during joint lives? Should it give the survivor any interest in the deceased's share, or should the first spouse to die be free to dispose of his or her interest by will, subject only to the survivor's right to apply for maintenance from the estate? An unseverable joint tenancy would, of course, give the survivor the whole interest in the home. It could be argued that this would be too generous to the survivor, especially where the home had been originally the sole property of the deceased (e.g. where it had been owned before marriage). The original owner would have no power to dispose of any interest in the home if the parties had not agreed upon severance during joint lives unless the law were changed to allow severance by will. This would probably be essential under co-ownership, otherwise it would be impossible for the spouses to take advantage of estate duty concessions which apply on the passing of a survivor's life interest. But if severance by

will were allowed the survivor would not necessarily succeed to any interest in the deceased's share.

1.85 One way of providing for the survivor would be to give him or her a life interest in the deceased's share. This rule could apply both to a tenancy in common and to a joint tenancy severed by will. In either case any disposition by the first spouse to die of his or her interest in the home would be subject to the survivor's life interest. Such a rule would ensure that the survivor could remain in the home for the rest of his or her life, and would also have estate duty advantages where there was a substantial estate. On the other hand it could be argued that the objective of co-ownership would be achieved by ensuring that the spouses shared the home equally, and that the question of succession rights in the home should be considered within the wider framework of inheritance rights. If the deceased has failed to meet his obligations to the survivor there is already a right to apply for family provision from the estate. In Part 3 of the Paper we propose that the court's powers to order family provision be extended to enable it not only to deal with the occupation of the matrimonial home, but also to transfer and settle property forming part of the estate on the death of a spouse. Taking these factors into account, therefore, our view is that it is not essential for co-ownership to include survivorship rights.[153]

(c) Contracting out

1.86 If a principle of co-ownership were introduced, the spouses should, in our view, remain free to contract out and make other arrangements as to the beneficial interests in the home. Their agreement should, subject to certain safeguards, be conclusive and binding upon them, except that it should be capable of variation by a subsequent agreement in the same form. The agreement should remain subject to the power of the court to vary the property rights of the

153. See also paras. 1.123-1.124 below.

parties in matrimonial proceedings. We consider that such an agreement should be in writing and signed by both spouses. In order to protect the weaker spouse, consideration should be given to requiring the signatures to be witnessed by a solicitor, or even by independent solicitors acting for each spouse. An agreement could affect not only a spouse, but, through that spouse, also the children. It is, however, arguable that where the spouses' agreement was limited to varying their beneficial interests in the home in minor respects and did not exclude the home from sharing altogether, it might not be necessary to impose such stringent requirements as to form. We leave this question open to discussion.

(d) Sharing of obligations

1.87 As we have said, the co-ownership principle ought not to give one spouse any greater interest than the other. And, if there were a mortgage, the co-ownership principle should operate subject to it. But should the spouse who is not the owner of the legal estate be liable in respect of the outgoings either to the landlord or mortgagee or to the other spouse? This is a question of some importance not only in respect of freeholds subject to a mortgage but in respect of all leaseholds and especially those at a rack rent.

1.88 As regards liability to third parties, we have no doubt that either spouse should be entitled to discharge the obligations, whether the spouses live together or apart. This result has been achieved by the Matrimonial Homes Act 1967, section 1(5). But we take the view that a spouse who is not the legal owner ought not to be personally liable to the mortgagee, lessor, or any other person whose claim is against the legal owner, even though his or her interest may be affected by enforcement of the claim.[154] This is, of

154. The position of a beneficiary spouse when a mortgagee or landlord claims possession was considered in relation to occupation rights: see paras. 1.10-1.14 above.

course, the usual position of a beneficiary.

1.89 As between the spouses, while they are living together there should be no problem. Payments made by one spouse should be considered as payments by and on behalf of both, and co-ownership interests should not be affected by the fact that one paid rather than the other. Once cohabitation has ended, however, the situation is different. Suppose, for example, that the wife leaves the husband with a large mortgage commitment, or in a flat held at a rack rent. Do his payments continue to be made on behalf of both, or must she contribute or give credit? In principle it seems attractive to suggest that if the spouses are to share the benefit of the home, they should also share the burdens. If the wife has assets there seems to be no reason why she should be able to escape contributing to the outgoings. Even if she has no assets, it seems to us that since the co-ownership principle gives her a beneficial interest in the home, she should be liable, at least to the extent of the interest to contribute to the outgoings.

1.90 For these reasons, it is our view that as between the spouses they should in principle be liable to account to each other in respect of outgoings incurred after cohabitation has ceased.[156] The payer should be given credit, but there might also be a set-off, for example, where one spouse has had the benefit of occupation while the other has not. We recognise that as a practical matter the principle of sharing obligations could be effective only where the spouse concerned had assets, or where the outgoings could be set against the value of his or her interest in the matrimonial home.

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156. See Wilson v. Wilson [1963] 1 W.L.R. 601,609 (C.A.) per Russell L.J.; Falconer v. Falconer [1970] 1 W.L.R. 1337 (C.A.) per Lord Denning M.R.; Davis v. Vale [1971] 1 W.L.R. 1022 (C.A.) per Lord Denning M.R.; Cracknell v. Cracknell, The Times, 23 June 1971, p.7 (C.A.).

(e) Two or more homes

1.91 If the spouses own more than one matrimonial home at a time, there are several ways of applying co-ownership:

(a) Co-ownership could attach only to the principal home (which would have to be defined).

(b) The spouse claiming an interest in a home could be made to elect.

(c) The co-ownership principle could apply to each home.

There are, of course, arguments in favour of limiting co-ownership to one home. If a suitable definition of the principal home could be found, solution (a) would be workable, especially where the homes were owned by one spouse. It might appear less satisfactory where each spouse owned a home. In either case we do not think it should be left to either spouse to choose which home should be shared (though they could, of course, agree the matter) and therefore do not favour solution (b). We leave this question open to discussion.

(f) Successively owned homes

1.92 Under present rules, where the legal estate is vested in one spouse and the beneficial interest is shared, on the sale of the home the beneficial interest of each spouse attaches to the proceeds of sale. The court can trace that beneficial interest through a series of later transactions and determine the interest of each spouse in a later home or in other funds or property.[157] However, the co-ownership principle would not depend on financial

157. Matrimonial Causes (Property and Maintenance) Act 1958, s.7; see e.g. Nixon v. Nixon [1969] 1 W.L.R. 1676 (C.A.), where the spouses had owned five homes.

contribution, but would attach to the matrimonial home automatically. It might be unfair if the result of this was to give a spouse an interest both in the proceeds of sale of one home and in a new home. Whether or not the new home was acquired before or after the first one was disposed of, in our view it should be presumed that the proceeds of sale of the first home were used to purchase the later home.

1.93 The effect of this rule would vary according to whether the later home cost more or less than the proceeds of sale. For example, if a home were sold for £5,000 and a new home purchased for £6,000 then it would be presumed that the later purchase price of £6,000 included the whole proceeds of sale of the first home. On the other hand, if the second home was purchased for only £4,000, there would be a "surplus" of £1,000. In this case the ordinary rules should apply. The spouses' beneficial interest would prima facie attach to the surplus. Where one home was sold and no further matrimonial home was acquired, either because the spouses had separated, or for any other reason, the beneficial interest under co-ownership would prima facie attach to the whole proceeds of sale, and the normal tracing rules would apply.

1.94 The effect of the presumption rule is that the spouses would share the worth of the most valuable home owned by them during the marriage. There would be several factors to take into account, for example, the extent of the beneficial interest if any particular house were subject to a mortgage. At this stage, however, we confine ourselves to the general principle; the details of its application should be further considered if it were decided to implement co-ownership.

(g) Estate duty and bankruptcy

1.95 As we have seen,[158] estate duty considerations may affect the choice between a beneficial joint tenancy and a tenancy in common as a means of implementing co-ownership. One estate duty problem is that if the interest held by a surviving spouse under the co-ownership principle were regarded as having been acquired by an inter vivos gift, it would attract duty if it had been acquired within seven years of the death of the other spouse. This is because estate duty law makes a clear distinction between interests acquired by way of gift and those acquired for valuable consideration. Estate duty law does, however, regard a marriage itself as a consideration and allows an exemption in respect of certain gifts in consideration of marriage.[159] Co-ownership makes no distinction on the ground of financial contribution; it recognises the partnership element in marriage and applies it to the home. In a sense, marriage itself is the consideration for co-ownership though co-ownership does not operate until there is a matrimonial home. Our view is that an interest created for a spouse under co-ownership ought not to be considered as a dutiable gift.[160] There is an analogy with capital gains tax, under which a disposition between spouses does not normally attract tax. The unity of the spouses is thus recognised.

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158. Para 1.85 above.

159. Finance Act 1968, s.36. Gifts up to £5,000 to either spouse from the other spouse or from a parent or grandparent are exempt.

160. To prevent abuse, it might be necessary to fix an upper limit on the amount. Any agreement between the spouses to vary the terms of co-ownership, e.g. the surrender of one spouse's interest to the other, ought not to be exempted under these rules. For an estimate of the cost of exempting the surviving spouse's interest in the home from estate duty, see n.138 above.

1.96 A similar problem arises in connection with bankruptcy. Should the acquisition of an interest by a spouse under the co-ownership principle be regarded as a voluntary settlement, or as a disposition for value? The present policy is that a spouse's interest created by a voluntary disposition should not take precedence over creditors.[161] If it were thought necessary to preserve this policy, one would have to fall back on the principle of financial contribution to determine whether a particular transfer was voluntary. This, however, would add an unfortunate complication. In our view it would not unduly derogate from creditors' rights if they were able to look only to the bankrupt's half share,[162] so long, at any rate, as this was restricted to one matrimonial home.

5 EXCLUSION OF CO-OWNERSHIP

1.97 We have already indicated that in our view the spouses should be free to agree to exclude or to vary co-ownership. There are certain cases where it could be argued that co-ownership should be excluded automatically, without the need for an agreement.

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161. Bankruptcy Act 1914, s.42; Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, para. 78; s.42 applies to dispositions made within two years of the bankruptcy or within 10 years unless it can be proved that all debts of the bankrupt could be met without recourse to the property.

162. In practice, the trustee in bankruptcy is reluctant to sell the matrimonial home and evict the spouses from it; frequently it is sold to the non-bankrupt spouse for an almost nominal consideration.

(a) Home owned before marriage

1.98 Should a home owned by one spouse before marriage be excluded from co-ownership? There are two preliminary matters to consider. The first is that quite often one spouse buys a house before marriage with the help of a large mortgage which is paid off during the marriage. If there were to be an exception, it might be thought fair to limit it to a home owned absolutely before the marriage. The second is that it might appear arbitrary if co-ownership did not affect a home owned before marriage, yet applied to a home acquired after marriage with assets owned before marriage. Nevertheless it would introduce great complexity and uncertainty if it became necessary to trace the sources of funds; the fact that a spouse chose to use his assets to purchase a home during the marriage might appear to justify the application of co-ownership in these cases.

1.99 Returning to the question whether co-ownership should apply to a home owned absolutely before marriage, the arguments against applying co-ownership are first, that the home did not derive from the actual or notional efforts of the spouses during marriage; secondly, a spouse who owned a family home which passed from generation to generation and who wished to continue this tradition might be forced to seek legal advice; thirdly, there might be hardship to a person who entered into a second marriage, e.g. a widow with young children who owned her home absolutely would have to surrender a half interest in it on re-marriage. On the other hand there are strong arguments in favour of applying co-ownership universally. First, the matrimonial home is, in terms of value and use, the principal family asset, and it should be irrelevant who paid for it or when it was acquired. Secondly, co-ownership, if introduced, should apply as widely as possible. Thirdly, it would be unfair to leave it to the non-owner spouse to attempt to reach an agreement with the owner spouse. Where

a home has been in a family for generations it is likely that legal advice would be taken in any event. On balance, our view is that co-ownership should apply to homes owned before marriage, though we recognise that this is a matter on which views will differ.

(b) Home acquired during marriage by gift or inheritance

1.100 As regards a home acquired by one spouse during marriage by way of gift or inheritance from a third party, arguments similar to those outlined above can be applied. There are, however, additional factors to take into account. If co-ownership were to apply automatically, the donor could not make an absolute gift to one spouse without asking the other spouse to agree to exclude co-ownership. It seems undesirable that a donor should have to ask for such an agreement. The result would probably be that the donor would either refrain from making the gift or resort to some other device (such as granting a life interest)[163] to achieve his purpose. One solution might be to allow the donor to exclude co-ownership by express declaration, but this could appear invidious, and may be even more undesirable than an agreement to exclude. It seems preferable to recognise that a donor who wished to exclude co-ownership will find some means of doing so. Our provisional view is, therefore, that a home acquired by one spouse by gift or inheritance should not be subject to co-ownership,[164] unless the donor made an express gift to both spouses, or unless the donee agreed to share with the other spouse.

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163. See below, para. 1.101.

164. This exclusion should apply to a home acquired by gift or inheritance from a third party during, or in contemplation of marriage.

(c) Life interest

1.101 Is it practicable to apply co-ownership where the interest of one spouse in the home is a life interest? In our view granting a spouse an interest in property during the life of the other spouse would lead to unnecessary complications without conferring any substantial benefit. If the life interest were part of an ante- or post-nuptial settlement, it could be varied by the court in the event of a divorce.

(d) Business premises

1.102 The matrimonial home may form part of premises used for business purposes, for example, a shop with living accommodation attached, or a farm. In principle, it would appear fair to apply the co-ownership principle to the residential part of the premises provided that the practical difficulties in assessing separately the value of the living accommodation could be overcome. It might, however, be impractical to apply all the proposals which we make relating to the matrimonial home trust, for example, those under which a spouse would be entitled to apply to have the legal title vested in joint names.[165] On breakdown of marriage or on divorce, the court in determining occupation rights, and in considering whether to order sale, should give special weight to the needs of the spouse running the business, and to the fact that it might not be practicable to dispose of the business without the living accommodation.

165. For proposals concerning the matrimonial homes trust, see para. 1.115 ff. below.

1.103 The co-ownership principle would operate automatically on the spouses' beneficial interest in the matrimonial home, but would not, of itself, have any immediate effect on the legal estate. As we have seen, it is often the case that the legal estate is in the name of one spouse. How are the interests of the other spouse under co-ownership to be protected against adverse dealings which may result in a third party acquiring an interest in the home?

(a) Registration of beneficial interest

1.104 In an earlier section the point was made that whereas the non-owner spouse may, by registration, protect rights of occupation from third party dealings, there is no means of registering a beneficial interest in the home.[166] Registration is not necessarily an effective means of protection; it may not be thought of until too late, and it may be regarded as a hostile act for a spouse to register an interest against the other spouse. Under the present law there would be practical difficulties in permitting registration of a beneficial interest. The existence of the beneficial interest might be a matter of doubt which would have to be resolved by litigation. Under co-ownership, which would be of almost universal application, this difficulty would be minimised.

1.105 It could be argued that in view of a spouse's power to register occupation rights under the 1967 Act it is not necessary to have the additional right to register a beneficial interest. However, there are certain points of difference. Under the 1967 Act a registered charge must

166. An interest in the proceeds of sale is not an interest in land and does not give rise to a registrable interest: Taylor v. Taylor [1968] 1 W.L.R. 378 (C.A.) Irani Finance Ltd. v. Singh [1971] Ch. 59 (C.A.).

be cancelled when either spouse dies or if the marriage is otherwise terminated, unless the court has extended the rights of occupation. Further, the court may terminate the rights of occupation of a spouse even though that spouse remains a beneficial owner. Since the beneficial interest under co-ownership can exist quite independently of rights of occupation, in our view a spouse ought to have an independent right to protect it by registration. In practice registration of both interests could probably be effected at the same time.

1.106 If registration were permitted, a spouse's beneficial interest in the matrimonial home under the co-ownership principle would be different from an interest in property under a trust for sale, which does not give rights of registration. A spouse would have an interest comparable with a direct equitable interest in land. It would, in our view, be appropriate to refer to the trusts under which the spouses' interests arise by a special term, such as "the matrimonial home trust". Other aspects of this new form of trust are considered below.[167]

(b) Vesting order

1.107 The most effective method of protecting a spouse's beneficial interest in the home would be to ensure that the legal estate became vested in joint names. Since both spouses would then have to be parties to any later transactions, this would protect rights of beneficial ownership, as well as rights of occupation. The spouse in whose name the legal estate is vested would, of course, have power to vest the property in joint names. The other spouse should also be entitled to apply to the court for an order vesting

167. Para. 1.115 ff.

the property in joint names.[168] But an application of this kind might be considered as a hostile act or might be left until too late.

(c) Declaration by purchaser spouse

1.108 Another method of vesting the home in joint names which we have considered would be to require every purchaser of land to make a declaration in the conveyance in the following form:

> "The premises hereby transferred will be occupied within [6] calendar months from the date hereof as a matrimonial home by [names of H & W] and will be subject to a matrimonial home trust."

OR

> "The premises hereby transferred will not be occupied within [6] calendar months from the date hereof as a matrimonial home and will not be subject to a matrimonial home trust."

The effect of a positive declaration would be to create an immediate trust in favour of husband and wife;[169] any transfer that did not vest the legal title in the husband and wife would be void, except that it would take effect

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168. cf. Trustee Act 1925, s.58(1), s.40. In the case of registered land, the legal estate will not pass until appropriate action is taken by the Registrar: Land Registration Act 1925, s.47. The application for a vesting order should be registrable.

169. Even if the marriage had not yet taken place.

as a contract to convey to the spouses.[170] If the declaration were negative, a subsequent purchaser would take a good title free of any interest of the other spouse.

1.109 An initial declaration of this sort would minimise the possibility of fraud and evasion; the fact that the declaration had to be made at the time of purchase might lessen the chances that a spouse would attempt to defeat the interest of the other spouse; on the other hand it would hardly be practicable to limit the need for a declaration to premises already adapted for residential use, and it seems singularly artificial to require a declaration in respect of non-residential property.

1.110 On consideration, our view is that this system is open to the fatal objection that it asks a purchaser to declare as a fact (and as a matter of law) something which is no more than an intention and an opinion as to its effect. The longer the period stated in the declaration the more speculative it becomes. Suppose, for example, spouses buy a property intending to renovate it before occupation, or suppose they purchase land intending to build. It might be impossible to decide which declaration to make. If a marriage had not taken place at the time of conveyance, and never did take place, there would be many problems if a positive declaration had been made. More seriously, the proposed procedure would not affect existing matrimonial homes, nor would it affect a home owned by a party before marriage, which had not been acquired in contemplation of marriage within the stipulated period. In these cases, if the co-ownership principle applied, the beneficiary spouse's protection would depend on his or her right to apply for a vesting order, or to register his or her interest.

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170. cf. Settled Land Act 1925, s.13, Law of Property Act 1925, s.27.

(d) Declaration by vendor spouse

1.111 Another way of protecting the interests of a spouse who has no legal title, would be to require every vendor, lessor or mortgagor of property which included a dwelling house to make a declaration to the effect that:

> "no person other than a party to [the conveyance][170] has any interest arising under a matrimonial home trust in the property [conveyed]."[171]

A conveyance without the declaration would be void, and a false declaration could give rise to penal sanctions. The declaration would be conclusive; the purchaser would not be affected by actual or constructive notice of a spouse's interest.[172] If the vendor were unable to make the declaration either he could convey the property into joint names,[173] or the other spouse could join in the conveyance. This might encourage spouses to put the home in joint names at the time of the original purchase.

1.112 An advantage of this method is that it could be applied to all existing matrimonial homes, even those which had not originally been acquired as such. The declaration would relate to an actual, rather than to a prospective situation and would be needed only where the property at the time of sale was or included a dwelling house. On the other hand a spouse who was determined to defeat the other's interest might not be deterred from making a false declaration.

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171. In the case of a lease or mortgage different wording would be used, as appropriate.

172. He would, of course, be affected by any registered interests.

173. Since no beneficial interest would be transferred, no stamp duty would be payable.

1.113 To summarise, we envisage that a spouse with a beneficial interest in the matrimonial home under co-ownership would have available any of the following methods of protecting that interest:

(a) The right to protect the beneficial interest in the home by registration (para. 1.105).

(b) The right to apply to the court for an order vesting the legal estate in the home in joint names (para. 1.107).

(c) The requirement that the vendor of a home should declare whether any person has a beneficial interest in that home under the matrimonial home trust (para. 1.111).

These are intended as cumulative rights rather than as alternatives.

(e) Safeguarding third parties

1.114 It would be premature at this stage to decide which, if any, of the possible schemes discussed above for protecting the beneficial interest of a spouse would be most effective. There are many technical conveyancing problems which need to be considered in detail. Whichever scheme were chosen, however, we would stress that third party interests must be adequately protected and conveyancing must not be made unduly complicated. A third party purchaser ought to be able to discover without difficulty the interests involved and to take a good title free of any beneficial interest of which he has not had proper notice. How should it be determined whether the third party has had notice? Obviously, the question is only of importance where a beneficiary spouse

was not a party to the conveyance. If the scheme requiring the vendor to make a declaration were implemented,[174] a spouse with a beneficial interest would be a party to the conveyance except in the case of fraud. In the absence of such a scheme, the only practical solution, in our view, would be to provide that the purchaser for value should not be affected by the beneficial interest of a spouse unle that interest had been protected by registration.[175] In all other cases the purchaser should take a clear title, free of the beneficiary spouse's interest, which would attach to the proceeds of sale.

7 THE MATRIMONIAL HOME TRUST

(a) During marriage

1.115 Where a matrimonial home is beneficially owned by both spouses under the co-ownership principle we have suggested that it should be subject to a new form of trust, called a "matrimonial home trust", which would regulate the rights and obligations of the spouses and third parties.[176] In our view this is a far more appropriate term than "trust for sale" which to the layman seems to imply that the property must be sold. We have already indicated two major rules which should in our view be part of the matrimonial home trust system; first, that the beneficiary spouse should be entitled to protect his or her interest by registration; and, secondly, that the vendor of property including a dwelling house should be required to declare whether the property is subject to a matrimonial home trust

174. Paras. 1.111-1.112.

175. Paras. 1.104-1.106.

176. Para. 1.106.

1.116 Another rule, which in our view should be part of the matrimonial home trust, is that the beneficial interests of the spouses should become direct equitable interests in land, rather than, as now, interests in the proceeds of sale, under a trust for sale. It should also be a term of the matrimonial home trust that during the marriage the home should be retained for the joint enjoyment of the spouses, and that it should be disposed of or otherwise dealt with only with the consent of both spouses.[177] Failure by the legal owner to obtain consent would be a breach of trust. Where a spouse refused to concur in a transaction, the other spouse should be entitled to apply to the court for an order.[178] The court should decide questions concerning occupation and sale in accordance with the principles outlined below. Although these proposals concerning the matrimonial home trust are made in conjunction with co-ownership, if co-ownership were not implemented we think that the proposals could be considered at a later stage to see if they could be applied wherever the beneficial interest in the matrimonial home was shared by the spouses.

(b) Breakdown of marriage

1.117 If the marriage broke down, and the spouses separated, the chief purpose of the matrimonial home trust, to provide a joint home, would come to an end. If neither spouse wished to occupy the home there would seldom be any problem. It could be sold and the proceeds divided. More commonly, there would be a dispute either as to which spouse could continue in occupation, or between the spouse who wished to remain in occupation and the other spouse who wished to recover his or her interest in the home

177. cf. Jones v. Challenger [1961] 1 Q.B. 176 (C.A.); Law of Property Act 1925, s.28(1). If a declaration were required from a vendor (paras.1.111-1.112) consent would be required automatically.

178. cf. Law of Property Act 1925, s.30; Re Beale's Settlement Trusts [1932] 2 Ch. 15.

through a sale. Under present law these questions can be determined in two different types of proceeding.

1.118 Where the legal estate is vested in one spouse, then, whether or not the other spouse has any beneficial interest in the home, rights of occupation can be determined under section 1 of the Matrimonial Homes Act 1967. Proceedings are heard in the county court or in the Family Division of the High Court.[179] As we have seen, the court must decide what is just and reasonable having regard to the conduct of the spouses, their means and needs, the needs of any children, and all the circumstances of the case.[180] Although the court is concerned with rights of occupation, its decision indirectly affects property rights If a spouse's rights of occupation are protected by registr tion the legal owner cannot sell or otherwise dispose of th home except subject to the other spouse's rights of occupa- tion under the court's order. In practice, this means he cannot sell at all.

1.119 Where, however, the legal estate is vested in the spouses jointly, the Matrimonial Homes Act 1967 does not apply. Disputes between the spouses concerning the home are heard in Chancery on the application of one spouse that the other be ordered to concur in a sale.[181] The dispute is determined in accordance with general property law principles. These generally require that once the purpose of providing a matrimonial home for the spouses has come to an end the trust for sale should be implemented, i.e. the property should be "converted" and each spouse should take

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179. From 1 October 1971 the Family Division has taken ove this jurisdiction from the Probate Division: Administration of Justice Act 1970, S.I. 1971 No.124 (c.32).

180. Matrimonial Homes Act 1967, s.1(3), para. 1.8 above.

181. Law of Property Act 1925, s.30.

his or her share.[182] One exception is that a husband cannot enforce sale where a wife can establish that because of her right to be maintained by her husband, she is entitled to remain in occupation.[183] On the other hand, if she has lost the right to be maintained, or if allowing her to remain in occupation would exceed her maintenance rights, sale will be enforced on the husband's application.[184] He has no corresponding right to be maintained.[185]

1.120 In our view it is unsatisfactory that there should be different proceedings and that different principles should be applied, to determine the spouses' rights according to whether one spouse is legal owner or both spouses are joint legal owners. All these matters should be heard by the Family Division. Principles similar to those set out in section 1(3) of the Matrimonial Homes Act 1967[186] should apply to disputes between spouses as joint legal owners, whether under present law or under any new principle of co-ownership. That section makes no distinction between husband and wife, and the right to occupy does not necessarily depend on the right to be maintained. The court should consider what is just and reasonable in the

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182. Jones v. Challenger [1961] 1 Q.B. 176 (C.A.); M.J. Prichard "Trusts for Sale - The Nature of the Beneficiary's Interest" (1971) 29 Cam. L.J. 44, 48-49.

183. Gurasz v. Gurasz [1970] P.11 (C.A.); Re Hardy's Trust (1970) 114 Sol.J. 864 (applying dictum of Lord Hodson in National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175, 1220 (H.L.)).

184. Jackson v. Jackson [1971] 1 W.L.R. 59. The wife's rights do not prevail against the trustee in bankruptcy: Re Solomon [1967] Ch. 573.

185. Jones v. Challenger [1961] 1 Q.B. 176 (C.A.); Rawlings v. Rawlings [1964] P.398 (C.A.), 415 per Harman L.J.; Re John's Assignment Trusts [1970] 1 W.L.R. 955. cf. Bedson v. Bedson [1965] 2 Q.B. 666 (C.A.).

186. Para. 1.8 above.

circumstances, balancing the hardship caused to a spouse who is turned out of the home against that caused to a spouse who cannot immediately realise his or her investment by enforcing sale.

1.121 Prior to a divorce, the court should, in our view, be reluctant to order sale against a spouse in occupation unless there are compelling reasons for enabling the other spouse to receive his share and no other practicable means of achieving this. The reason for this is that once a decree has been granted, the court will be able to exercise its powers under section 4 of the Matrimonial Proceedings and Property Act 1970, to vary the spouses' interests or to transfer one spouse's interest to the other.[187] If matrimonial proceedings are pending the position should be preserved until financial provision is considered by the court. The principle that all property questions should be dealt with together was recognised in a recent Practice Note in which it was stated that it would be convenient if applications under section 17 of the Married Women's Property Act 1882, applications for financial provision and applications under the Matrimonial Homes Act 1967 could be heard by the same tribunal.[188]

187. See, e.g. Radzicj v. Radziej [1967] 1 W.L.R. 659; Smith v. Smith [1970] 1 W.L.R. 155 (C.A.).

188. Practice Note 29 Jan. 1971, [1971] 1 W.L.R. 260.

(c) Divorce, judicial separation and nullity

1.122 On granting a decree of divorce, judicial separation or nullity, the court has wide powers to make financial provision for either spouse.[189] These powers include:

(a) the award of a lump sum or periodical payments;

(b) the transfer or settlement of the property of either spouse for the benefit of the other spouse or the children of the family;

(c) the variation of any ante- or post-nuptial settlement (for example, where the home is in joint names).

The court, in exercising these powers, must take into consideration certain factors,[190] including the means, needs and conduct of the spouses, the length of the marriage, the age of the spouses, the standard of living of the family and "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family". These powers allow the court to deal with the matrimonial home on whatever basis is considered appropriate. It has been held that where both spouses have an interest in the home and there is an application to vary these interests (as a post-nuptial settlement), the court has a complete discretion.[191] The interests of a spouse wishing to remain in occupation must be balanced against those of a spouse wishing to sell. These powers would, in effect, become

189. Matrimonial Proceedings and Property Act 1970, ss. 2 and 4.

190. Matrimonial Proceedings and Property Act 1970, s.5.

191. Smith v. Smith [1970]1 W.L.R. 155 (C.A.); Spizewski v. Spizewski [1970] 1 W.L.R. 522, 524 (C.A.) per Lord Denning.

powers to vary the matrimonial home trust but should continue to be exercisable where the interests arose under the present law.

(d) Succession rights

1.123 The present rules governing a spouse's succession rights in respect of the matrimonial home were described above.[192] The main purpose of the proposals concerning co-ownership is to secure equal interests in the home. The survivor would always retain at least his or her share, but depending on how co-ownership were implemented, it might or might not lead to additional rights of survivorship.

1.124 In a later part of the Paper proposals are made to give the court power to allocate or transfer the matrimonial home under its family provision jurisdiction. We have already proposed that the court should have power to deal with the survivor's application in respect of occupation rights under that jurisdiction. For these reasons, we do not, in this part of the Paper, make any further proposals concerning succession rights in respect of the home. Nevertheless, when it has been decided what major changes are necessary in family property law, it might be appropriate to review this question, to ensure that the surviving spouse's interests have been adequately protected. This need no necessarily be part of co-ownership.

192. Paras 1.46-1.47.

C. SUMMARY OF PROPOSALS CONCERNING THE MATRIMONIAL HOME

1 RIGHTS OF OCCUPATION

1.125 The following proposals are made to extend and strengthen a spouse's rights of occupation in respect of a matrimonial home which is in the name of the other spouse. Most of these would require amendment of the Matrimonial Homes Act 1967.

(i) A spouse who is not in occupation of the matrimonial home and who has applied to the court for an order concerning occupation rights should be able to register the application as a lis pendens under the Land Charges Act 1925, section 2(1) or to protect it in the appropriate manner under the Land Registration Act 1925, section 59 (para. 1.7).

(ii) Where the landlord has obtained a possession order against a statutory tenant and the spouse of the statutory tenant has rights of occupation under the Matrimonial Homes Act 1967, that spouse should have the same right as the tenant to apply under section 11 of the Rent Act 1968 for an order restoring rights of occupation on terms (para.1.11).

(iii) Where a mortgagee seeks to recover possession the mortgagor's spouse in occupation should have the same rights as the mortgagor to apply to the court to exercise its discretion under the Administration of Justice Act 1970, section 36 (para. 1.13).

(iv) If the spouse of a mortgagor has protected his or her rights of occupation by registration under the Matrimonial Homes Act 1967, the mortgagee should be required to give that spouse notice of proceedings against the mortgagor for recovery of possession. It should also be made clear that the spouse could apply to be joined as a party to the proceedings for possession (para.1.14).

(v) The court's powers to order financial provision on granting a decree of divorce, nullity or judicial separation should include power to deal directly with rights of occupation in the matrimonial home (para. 1.18).

(vi) The powers conferred by section 7 of the Matrimonial Homes Act 1967 (under which, on a decree of divorce or nullity, the court may transfer a protected or statutory tenancy) should apply to local authority lettings and to other lettings excluded from the operation of the Rent Acts by sections 4 and 5 of the Rent Act 1968 (para.1.20).

(vii) The powers conferred on the court by section 7 of the Matrimonial Homes Act 1967 should become part of the court's powers to deal with financial provision on granting a decree of divorce or nullity (para.1.21).

(viii) It should be made clear that in the exercise of its jurisdiction under section 7 of the Matrimonial Homes Act 1967 the court has power to order the original tenant to leave the premises (para.1.22).

(ix) A surviving spouse should be entitled to apply under the Inheritance (Family Provision) Act 1938 for an order granting or extending occupation rights in the matrimonial home (para.1.24).

(x) A wife who has continued a protected or statutory tenancy by remaining in occupation after her husband's departure ought to have the benefit of the provisions of Schedule I of the Rent Act 1968, under which statutory tenancies are transmitted by succession (para. 1.25).

(xi) A widower should have the same right to succeed to a statutory tenancy under Schedule I of the Rent Act 1968 as a widow (para.1.26).

When considering these proposals it should be remembered that although rights of occupation can be enforced between the spouses, their effectiveness against a third party purchaser from one spouse is dependent on registration by the other spouse.[193] Further, if proposals concerning

193. In Unhappy Families, the Report of a Working Party set up by the Women's National Advisory Committee of the Conservative and Unionist Party, it was recommended that the matrimonial home should be registered as such either on purchase , or if already the property of one of the spouses, on marriage (No.13, p.40).

co-ownership were introduced, it would probably become normal for the home to be vested in both spouses. In that event, the 1967 Act would become of reduced importance.

2 OWNERSHIP OF THE MATRIMONIAL HOME

1.126 Having considered the various alternatives, it is our view that the main field of choice for the law concerning ownership of the matrimonial home is as follows:

(a) Maintaining the present rules under which:

(i) interests depend on the extent of each spouse's financial contribution to the acquisition or improvement of the home and on their intention; and

(ii) the court has a broad discretionary power to vary the rights of the spouses on divorce, nullity or judicial separation (paras. 1.27-1.51).

(b) Introducing a discretionary rule under which the court would have power to determine the respective interests of the spouses along broad equitable lines at any stage of the marriage (paras. 1.65-1.68).

(c) Introducing a form of co-ownership, either through a presumption or by operation of law, under which:

(i) each spouse would be given a direct beneficial interest in the home, and

(ii) the court would retain a broad discretionationary power to vary the interests of the spouses on divorce, nullity or judicial separation (paras. 1.69-1.75).

1.127 The advantages of a system of co-ownership are that it would recognise the partnership element in marriage by ensuring that the spouses had equal interests in the principal family asset; it would avoid much of the uncertainty and artificiality of the present law; and it would no longer be necessary to consider whether either spouse had made a financial contribution. On the other hand, although for many families the home is the only substantial asset, where this is not the case the application of automatic sharing rules to just one asset may lead to anomalies. Nevertheless, sharing in a limited field may seem preferable to no sharing at all, or to a wider and more complex system of sharing such as that discussed in Part 5. It is our provisional view that subject to suitable transitional arrangements a system of co-ownership would be a workable solution and that it would meet many of the objections to the present law. Obviously this is a matter on which many people will wish to express views, which we shall welcome.

1.128 Although we have not reached any final conclusions as to co-ownership, to assist those concerned in forming a view we set out below tentative proposals for an outline scheme. Many details remain to be settled.

(i) Wherever one spouse has an estate or interest in the matrimonial home, the co-ownership principle should apply (para. 1.78)

(ii) Under the co-ownership principle each spouse should have the same beneficial interest in the matrimonial home (para. 1.82); the spouses' interests should be subject to a matrimonial home trust (paras. 1.106, 1.115-1.116).

(iii) The spouses should be free to make a binding agreement concerning their interests in the matrimonial home, provided that suitable safeguards are applied (para. 1.86).

(iv) Where the principle of co-ownership applies each spouse should be liable to account to the other spouse in respect of payments and outgoings incurred in respect of the home after cohabitation has ceased (para. 1.90).

(v) Where the principle of co-ownership applies, it should be presumed that the proceeds of sale of one matrimonial home were used to purchase a later matrimonial home (para. 1.92).

(vi) Co-ownership should apply to a home owned by one spouse before marriage (para.1.99); a home acquired by a spouse during marriage by gift or inheritance from a third person should be excluded from co-ownership (para. 1.100).

(vii) Co-ownership should not apply where a spouse's interest in the matrimonial home is a life interest (para.1.101).

(viii) Co-ownership should apply, in principle, to a matrimonial home forming part of business premises, but special rules might be required to ensure that the powers to manage and dispose of the business were not impeded (para.1.102).

(ix) A spouse's beneficial interest in the matrimonial home should be registrable (para. 1.105).

(x) A spouse with a beneficial interest in the matrimonial home should be entitled to apply for an order vesting the legal estate in joint names (para. 1.107).

(xi) A person selling property should be required to make a declaration concerning the application of the matrimonial home trust; such a declaration should be conclusive and binding on a third party purchaser for value (paras. 1.111-1.112).

(xii) The beneficial interests of the spouses under the matrimonial home trust should be direct equitable interests in land (para. 1.116).

(xiii) It should be a term of the matrimonial home trust that the home should be retained for the joint enjoyment of the spouses, and that it should be disposed of or otherwise dealt with only with the consent of both spouses (para. 1.116).

(xiv) Disputes between the spouses concerning occupation and sale should be determined by the court in accordance with matrimonial rather than property law principles (para. 1.120).

PART 2

THE HOUSEHOLD GOODS

1 INTRODUCTION

2.1 This part of the Paper will consider the position of the spouses in relation to:

(a) the ownership of the household goods, and

(b) the right to the use and enjoyment of the household goods.

2.2 In the scheme of family property law the household goods occupy an important position. From the point of view of their use the contents are as important as the home itself, since the right to occupy the home may be of little value without a right to retain possession of the household goods. Considered as a financial asset, however, there is an important distinction to be made between the home and the household goods, since the actual value of the latter is likely to be small, and to be much less than the cost of replacement, whereas the home is often a substantial asset, the value of which increases in time.

2.3 A possible definition of household goods is discussed later.[1] But for the purpose of preliminary discussion they should be taken to include all those things which are used in the matrimonial home, excluding such items as personal clothing or jewellery, or things used exclusively for business purposes. We also exclude from

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1. Para. 2.35 below.

the term the family car (or other vehicle). The car is too important, and gives rise to too many problems of its own, to be included merely as an item in the group of household goods. Nevertheless much of what is said in this Part is relevant to its use and enjoyment. Accordingly we include a paragraph dealing with it.[2]

2 PRESENT LAW RELATING TO HOUSEHOLD GOODS

(a) Ownership

2.4 The rules governing the ownership of movable property are similar to those governing the ownership of land, which were considered in Part 1: the Matrimonial Home. With few exceptions,[3] no special rules apply to husband and wife. In general, the beneficial ownership belongs to the person or persons who provided the purchase price, or to whom the property was given.[4]

2.5 It is possible for spouses to share the ownership of movable property either jointly, or in common. It is largely a question of intention and contribution whether any item is owned by one spouse or by both. Relevant evidence would include the circumstances of the acquisition, the source of payments, and any express declaration. If it is found that both spouses contributed to the property, then, in the absence of contrary evidence, they would share the beneficial interest. The effect of indirect contributions is uncertain, but in the case of

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2. Para. 2.44 below.

3. One exception is the presumption of advancement: see para. 1.29 above; another concerns savings from a housekeeping allowance: para. 2.7 below.

4. For the complicated rules governing gifts between spouse see Thornely, "Transfer of Choses in Possession between Members of a Common Household" (1953) 11 Cam. L.J. 355. These are mainly relevant to third party rights, which are not dealt with in this Paper.

land, recent decisions suggest that evidence of an agreement or intention to share would be necessary for such contributions to give rise to a beneficial interest.[5]

2.6 Beneficial joint ownership can come into being where the spouses pool certain resources to form a common fund. For example, if spouses have a joint bank account into which they both pay, then, if the court were satisfied that they intended to form a common pool, not only would they have an equal interest in the account, even if their contributions were unequal, but they would also be entitled to share property derived from that pool, unless it was clearly personal.[6] For example, there is no reason to doubt that each spouse would be held to own his or her clothes, even if purchased from a joint account. On the other hand, if there is no evidence of any special intention that a joint account should form a common pool, then if either spouse purchased property in his own name with money from the joint account it would be the property of that spouse.[7] It is a question of fact in each case; in some cases the joint account and property derived from it have been held to be the sole property of the original contributor.[8]

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5. Pettitt v. Pettitt [1970] A.C. 777 (H.L.); Gissing v. Gissing [1970] 3 W.L.R. 255 (H.L.); para. 1.37 above.

6. Jones v. Maynard [1951] Ch. 572; Rimmer v. Rimmer [1953] 1 Q.B. 63 (C.A.).

7. Re Young (1885) 28 Ch. D. 705; Gage v. King [1961] 1 Q.B. 188; Re Bishop [1965] Ch. 450; cf. Heseltine v. Heseltine [1971] 1 W.L.R. 342 (C.A.).

8. Marshall v. Crutwell (1875) L.R. 20 Eq. 328; Heseltine v. Heseltine [1971] 1 W.L.R. 342 (C.A.) per Lord Denning M.R. at 347.

2.7 Until 1964 the law was that any savings made by a wife from a housekeeping allowance made by the husband, and any property bought with the savings, belonged to the husband.[9] The Married Women's Property Act 1964, changed this rule; section 1 provides as follows:

> "If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares."

Certain criticisms have been made of this Act; for example, it does not apply to savings from an allowance made by a wife to her husband nor to savings made by the husband from his earnings.[10] The Act affects ownership of the household goods only if those goods were purchased with savings from the housekeeping allowance; it does not apply if a husband gave his wife money expressly for the purpose of purchasing furniture.[11] It would be a question of fact in each case to determine the intention of the parties.

2.8 Under the Matrimonial Proceedings and Property Act 1970, section 37, if a spouse makes a substantial

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9. Barrack v. M'Culloch (1856) 3 K. & J. 110; Montgomery v. Blows [1916] 1 K.B. 899 (C.A.); Blackwell v. Blackwell [1943] 2 All E.R. 579 (C.A.).

10. The recommendation of the Morton Commission, on which the Act was based, applied both ways: Royal Commission on Marriage and Divorce, Cmd. 9678, para. 701. For other criticisms of the Act see (1964) 27 M.L.R. 576. The Act applies in Scotland; see Forrest-Hamilton's Trustee v. Forrest-Hamilton (1970) Scots Law Times Rep. for an example of its application.

11. In Tymoszczuk v. Tymoszczuk (1964) 108 Sol. J. 676 it was held that mortgage repayments were not expenses of the matrimonial home; in Re John's Assignment Trusts [1970] 1 W.L.R. 955, 959 this point was referred to but not decided.

contribution in money or money's worth to the improvement of real or personal property belonging to either spouse, the spouse so contributing acquires a share or an enlarged share in the property, the extent of which is to be determined by the court. This is subject to any express or implied agreement between the spouses. Although this section mainly applies to improvements to the structure of the home, it expressly covers personal property. However, its application to furniture and other household goods is not likely to have much impact.

2.9 To summarise, the household goods prima facie belong to the spouse who provided the purchase price for the item in question, or to whom it was given. If the purchase price was provided by both spouses or came from a common fund or from savings made by the wife from a housekeeping allowance, then the property would prima facie be shared. A spouse who carried out or paid for improvements to an item belonging to the other spouse might acquire an interest in that item. All these rules are subject to any agreement between the spouses to the contrary.

(b) Enforcement of obligations during marriage

2.10 The pinciples outlined above apply in any proceedings between the spouses, for example, under section 17 of the Married Women's Property Act 1882. Where both spouses have an interest in property the court has power to sever a joint interest and to order sale and division of proceeds. But it cannot vary established rights during the subsistence of the marriage.[12]

2.11 The rights of the non-owner spouse against the owner spouse are limited. A spouse's statutory rights of occupation under the Matrimonial Homes Act 1967, which can be protected against third persons by registration, do not extend directly to the use and enjoyment of the household

12. Pettitt v. Pettitt [1970] A.C. 777 (H.L.); Gissing v. Gissing [1970] 3 W.L.R. 255.

goods. However, as it would not often be practicable for the spouse out of occupation to remove the goods, rights of occupation give a certain de facto protection to the use of the household goods.

2.12 At common law a wife has a right to remain in occupation of her husband's home unless she has lost her right to be maintained.[13] Although there is little authority on the point, it seems that the wife's common law right to be maintained may include the right to retain the use of certain essential items of furniture. However, it has been observed that the principles to be applied to furniture are not necessarily the same as those applied to the home itself.[14] In a case where some of the furniture was owned by the wife and some by the husband, and the husband had left the home, an order was made for the return of the husband's portion to him. Devlin J. said: "If the husband wanted to make a clean sweep of all the furniture so as to leave his wife with nothing but bare boards, a mere empty shell, an order for the return of the furniture [to him] might be refused".[15]

(c) Divorce, judicial separation and nullity

2.13 Any common law right which the wife may have to retain the use of household goods belonging to the husband would come to an end on the granting of a decree absolute of divorce or nullity.[16] The court granting such a decree has power to order either spouse to make financial provision for the other spouse or the children of the family by way of lump sum or periodical payments or by the transfer

13. Hutchinson v. Hutchinson [1947] 2 All E.R. 792; Lee v. Lee [1952] 2 Q.B. 489; Silverstone v. Silverstone [1953] P.174; Cook v. Cook [1964] P.220; Jackson v. Jackson [1971] 1 W.L.R. 59.

14. W. v. W. [1951] 2 T.L.R. 1135.

15. Ibid. at 1136, per Devlin J.

16. Though not on a decree of judicial separation: Hutchi v. Hutchinson [1947] 2 All E.R. 792; Halden v. Halden [1966] 1 W.L.R. 1481 (C.A.) (separation order).

or settlement of any property.[17] These powers are very wide, and provided that the household goods were owned by one or both spouses[18] the court would be able to make whatever adjustment was appropriate in the circumstances.

(d) Succession rights

2.14 If a spouse dies intestate the personal chattels pass to the surviving spouse absolutely.[19] Personal chattels are defined as:[20]

> "carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes, nor money or securities for money."

The above definition has been held to include the following: a motor yacht;[21] a stamp collection;[22] unmounted

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17. Matrimonial Proceedings and Property Act 1970, ss.2-4. The court must have regard to the criteria laid down by s. 5. For the text of these sections see the Appendix, p. 323 below.

18. For the position where goods are held on hire-purchase, see below, para. 2.17 ff.

19. Administration of Estates Act 1925, s. 46.

20. s. 55(1)(x).

21. Re Chaplin [1950] Ch. 507.

22. Re Reynolds' Will Trusts [1966] 1 W.L.R. 19; cf. Re Collins' Will Trusts [1971] 1 W.L.R. 37.

jewels;[23] and racehorses.[24] It has been suggested that the term "scientific instruments and other apparatus" would cover equipment used in hobbies such as photography.[25] It seems that the definition of personal chattels is wide enough to embrace all that we envisage as household goods,[26] and that the latter would pass to the survivor on intestacy. The definition has been criticised on the ground that a motor car used partly for business purposes, even if this is a minor use, is excluded. We believe there is substance in this criticism.[27]

2.15 If a deceased spouse leaves a will, his household goods and other personal chattels are distributed in accordance with its terms.[28] The personal representatives normallly have power to appropriate any property forming part of the estate in satisfaction of any legacy or interest in the estate,[29] but they are not obliged to exercise this power in favour of any particular beneficiary

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23. Re Whitby [1944] Ch. 210 (C.A.).

24. Re Hutchinson [1955] Ch. 255.

25. Bicknell, "Bequests of 'Personal Chattels'" (1966) 116 N.L.J. 1287, 1288.

26. Para. 2.35 ff. below.

27. For separate proposals concerning the car, see para. 2.44 below.

28. The will may define personal chattels by reference to section 55 (1)(x) (in which case the above comments apply) or by reference to the Statutory Will Forms (the effect of which is similar), or in some other way; it may also deal with chattels specifically: see, for example, Re Collins' Will Trusts [1971] 1 W.L.R. 37.

29. Administration of Estates Act 1925, s. 41.

2.16 If a deceased fails to make reasonable provision for the maintenance of the surviving spouse, the latter may apply for provision from the estate under the Inheritance (Family Provision) Act 1938.[30] The court's powers under this Act are at present limited to awarding a lump sum and/or periodical payments. It cannot award any particular item of property to the surviving spouse or to any other dependant. We make proposals in Part 3 to extend the court's powers to enable it to order the transfer or settlement of any property forming part of the estate of the deceased for the benefit of the surviving spouse or children.[31]

(e) Hire-purchase

2.17 Often, some of the household goods are acquired by hire-purchase. If the spouses are joint parties to the agreement they normally share jointly the liability and the benefits under the agreement.[32] When the option to purchase has been exercised, the property belongs to both of them. However, it is more common for the agreement to be in the name of one spouse, in which case it has an important effect on the mutual rights and obligations of the spouses in respect of the item concerned. This is because goods being purchased under a hire-purchase agreement remain the property of the owner (usually the hire-purchase finance company) until all the instalments have been paid, and the hirer has exercised the option to purchase. Until that time the

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30. A former spouse whose marriage to the deceased has been terminated by a decree of divorce or nullity can apply for provision from the estate under the Matrimonial Causes Act 1965, s. 26.

31. Paras. 3.27 ff.

32. In Unhappy Families, the report of a Working Party set up by the Women's National Advisory Committee of the Conservative and Unionist Party, it was recommended that hire-purchase agreements for household goods should be signed by both husband and wife (No. 37, p. 42).

hirer has contractual rights under the agreement but no interest in the goods.[33]

2.18 Where an agreement is in the name of one spouse, for example, the husband, and the wife contributes to the deposit or instalments, she may acquire thereby against the husband a beneficial interest in the agreement, and ultimately in the property.[34] But she cannot acquire any rights against the owner of the goods. If the husband fails to keep up the payments (e.g. because he has left the home) the wife has no right to continue the payments, nor to exercise the option to purchase, even if she has made a contribution. Assignment by the hirer is usually expressly forbidden by the agreement, even if the husband were willing to assign.[35] The owner might make a new agreement with the wife, but would not be obliged to do so.

2.19 On the death of the hirer, his interest under the agreement would, subject to any term in the agreement to the contrary, pass to his personal representatives.[36] If the agreement were one to which the Hire-Purchase Act 1965 applies,[37] any provision allowing the owner to terminate the agreement, or to recover the goods, or requiring any payment by the hirer, or otherwise having the effect of terminating the agreement on the death of the hirer or

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33. See generally, Goode, Hire-Purchase Law and Practice, (2nd ed. 1970) p. 32 ff.; Guest, The Law of Hire-Purchas (1966) s. 21 ff.

34. Under the principle of resulting trust: Mercier v. Mercier [1903] 2 Ch. 98 (C.A.); see Goode, p. 478, Guest, s. 818. If the agreement was in the wife's name the husband would not necessarily acquire an interest by virtue of a contribution, since the presumption of advancement would apply. Any dispute could be determined under the Married Women's Property Act 1882, s. 1

35. Spellman v. Spellman [1961] 1 W.L.R. 921 (C.A.), sugges that an equitable assignment or declaration of trust mi be possible, Goode, pp. 478, 526 ff.; Guest, s. 195; "Hire-Purchase and the Matrimonial Car" (1962) 78 L.Q.R

36. Goode, p. 555 ff.; Guest, s. 705 ff.

37. Under s. 2 the Act applies to agreements under which th total purchase price does not exceed £2,000.

preventing the benefit of the agreement from being transmitted on death, would be void.[38]

2.20 Under the present law of hire-purchase it would be difficult to introduce effective reforms of the law relating to household goods; where the goods were held under a hire-purchase agreement it would be necessary to take account of the owner's position and possibly to involve the owner in litigation. The position would, however, be much simplified if the recommendations in the Report of the Committee on Consumer Credit were implemented.[39] In a sweeping review of credit law they recommend that the fictions relating to hire-purchase agreements should be abandoned, and that they and all instalment sales should be regarded as outright sales financed by loans repayable by instalments.[40] The reservation of title under a hire-purchase or similar agreement should be regarded as a chattel mortgage securing a loan, and all forms of security interest should be dealt with by a uniform legal structure.[41]

2.21 Under the Crowther Committee recommendations the seller or finance company would not continue to own goods being purchased, as under present law, but would be a lender, who might in some cases retain a security interest in the goods.[42] Subject to this, the beneficial interest in the goods being

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38. s. 30; see also ss. 25 and 26 and the Hire-Purchase and Credit Sale Agreements (Control) Order, 1969, art. 6 (1964 S.I. No. 1307); Goode, p. 558 ff.

39. Crowther Committee, 1971, Cmnd. 4596, Vol. 1, Part 5, pp. 182-230.

40. Paras. 5.2.1-5.2.4.

41. Para. 5.2.8.

42. Para. 5.5.1 et seq.

purchased on credit would pass to the purchaser.[43] Although the lender might, subject to certain restrictions, be entitled to realise his security, the purchaser would in the meantime be able to dispose of the goods subject to the security interest.[44] The problems referred to in para. 2.18 above would be minimised since the purchaser's spouse would be able to acquire an interest in the goods, and an assignment of the purchaser's interest would be possible. The proposals made in the Paper take account of these recommendations; they are based on the assumption that the present law, under which the owner retains title throughout the period of the agreement, will be changed.

(f) Summary of difficulties under the present law

2.22 Although the household goods form a family asset of great importance the law does not appear to deal adequately with the mutual rights and obligations of the spouses in respect of them. The following criticisms of the present law have been made:

(a) The law is unfair; a spouse who, because of family duties, has no earnings and no other means cannot make a financial contribution to the acquisition of the household goods, and cannot therefore acquire any interest in them, except by way of gift.[45]

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43. Para. 5.6.8.

44. Paras. 5.6.17, 6.7.17 and para. 5.6.9. A bona fide purchaser for value without notice would take free of the interest.

45. Subject to the Married Women's Property Act 1964, para. 2.7 above.

(b) The law is uncertain; the effect of a particular payment by a spouse may depend on the view the court takes of the spouses' intentions or on whether there was any implied agreement between them; it is often fortuitous which spouse pays for a particular item.

(c) The law is ineffective; it fails to protect the non-owner spouse in the continued use and enjoyment of the household goods; this lack of protection can be contrasted with the protection of a spouses's rights of occupation under the Matrimonial Homes Act 1967.

(d) Where household goods are held under a current hire-purchase agreement, the interests of the owner under the existing law would unduly complicate effective measures for enforcing rights and obligations between the spouses.

In the following sections we shall examine these points of criticism and consider what, if any, reforms could be implemented. In view of the recommendations to change the law of hire-purchase, our proposals are based on the assumption that the difficulties mentioned in point (d) above will in due course be overcome. The areas we propose to consider are, therefore, the ownership of the household goods and their use and enjoyment.

3 OWNERSHIP OF THE HOUSEHOLD GOODS

2.23 One objection to the present law is that the rules for determining the ownership of the household goods are unfair and uncertain. In Part 1 of the Paper we considered four possible ways in which ownership of the matrimonial

home could be changed.[46] Of these, two appear suitable for consideration in relation to the household goods - discretionary power, and automatic co-ownership.

(a) Discretion

2.24 We considered whether it would be appropriate to allow the court to determine disputes concerning the ownership of the matrimonial home by exercising broad discretionary powers to decide what was equitable, taking into account the parties' contribution to the marriage as a whole.[47] Our view was that while a discretionary power would overcome the unfairness of the present law it would not overcome the uncertainties, since there would be no established proprietary rights pending a decision. Further, it would be superfluous to introduce a discretionary power to determine ownership of property since the court already has wide powers, on granting a decree of divorce, nullity, or judicial separation, to order the transfer or settlement of the property of either spouse.[48] In doing so, it must have regard to certain criteria, including the contribution made by a spouse in looking after the home and children.[49] These powers enable the court to order an equitable allocation of property on termination of the marriage,[50] and have already overcome some of the alleged unfairness of the law. In the interim period before a decree is granted it is more

46. Para. 1.62 ff. above.

47. Para. 1.65 ff. above.

48. Matrimonial Proceedings and Property Act 1970, s. 4.

49. s. 5(1) (f).

50. In Part 3 of this Paper, para. 3.27 ff. we propose that the court should have similar powers to deal with property on an application under the Inheritance (Family Provision) Act 1938 for maintenance from the estate of a deceased.

important to protect the right to the use and enjoyment of the property.

(b) Co-ownership

2.25 In Part 1 we also considered a system under which the spouses would automatically share the beneficial interest in the matrimonial home.[51] Although there would be many difficulties in devising a satisfactory system for co-ownership of the home we thought that these could be overcome if sharing this asset were thought right in principle. There would, in our view, be far greater difficulty in applying the co-ownership principle to the household goods. Spouses seldom have more than one matrimonial home at any one time, but the household goods are numerous, and are liable to rapid change. Whatever definition were chosen, there would be difficult problems of identification, and of tracing funds where old items were sold or part-exchanged for new items.

2.26 Even if the rules concerning ownership were changed, for example, by introducing a presumption of co-ownership this alone would not necessarily provide adequate protection for a spouse. In contrast to the home itself, which is often a substantial asset, the market value of the household goods is usually far less than the cost of their replacement. It would be of little value to a deserted wife to be awarded half the proceeds of sale or half the value of the household goods if her husband had already sold them or removed them from the home. The amount received would usually be inadequate to cover even partial replacement. In our view what is wanted is to establish the right of a spouse to the continued use and enjoyment of the household goods. For the moment, therefore, we make no proposals for the reform of the law relating to ownership of the household goods. When the overall pattern of the family property law has been

51. Para. 1.72 ff. above.

settled, it may be possible to formulate some proposals designed to reduce uncertainties and remedy unfairness in the ownership of the household goods. But the problem of ownership is not so important as that to which we now turn.

4 THE USE AND ENJOYMENT OF THE HOUSEHOLD GOODS

2.27 In our view, the reform which is most needed is to provide effective protection of the use and enjoyment of the household goods. The Matrimonial Homes Act 1967 recognises the right of a spouse to occupy the matrimonial home and to protect this right of occupation against third parties. A certain protection with regard to the household goods is afforded to the spouse in occupation of the home by the practical difficulties which might prevent the other spouse from removing the goods - e.g. the cost, and the absence of anywhere to put them. But this protection depends on chance. The right to occupy may be of little value unless there is a corresponding right to retain possession of the household goods: we shall consider how such a right could be enforced. Before making proposals, we examine briefly how this matter is dealt with in certain other countries, and earlier recommendations made in England.

(a) Other countries: restraint on dispositions

2.28 Some countries have special provisions governing the rights and obligations of the spouses, including their power to deal with the home and the furniture. In France, for example, neither spouse may, without the consent of the other, dispose of his or her interest in the matrimonial home or the furniture.[52] This provision is one of several governing the mutual rights and obligations of the spouses, which apply regardless of whether the spouses are subject to a regime of community or to a regime of separate property.

52. C.C. 215 al. 3 (as amended by the Law of 13 July 1965).

A spouse who has not consented to a disposition may apply within one year from the date of discovering it to have it set aside. Although third parties dealing in good faith with one spouse are protected in regard to movables this protection does not extend to those that are classed as household goods.[53] If a spouse refuses consent to a transaction the other spouse may, if the refusal is not in the interests of the family, apply to the court for authority to act alone.[54] There are similar provisions in German and Scandinavian Law.[55]

(b) New Zealand: domestic proceedings[56]

2.29 Under section 43 of the New Zealand Domestic Proceedings Act 1968, it is provided that where proceedings for a separation order are pending in a magistrate's court[57] no party shall, without the leave of the court, or the consent in writing of the other spouse, sell, charge, or dispose of any of the furniture in the matrimonial home, or (except in an emergency) remove any such furniture from the home.[58] A breach of this provision is an offence punishable

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53. C.C. 222 al. 2.

54. C.C. 217.

55. Germany: B G B 1369; Denmark: I.M. Pedersen, "Matrimonial Property In Denmark" (1965) 28 M.L.R. 137, 141; Sweden: Marriage Code, 11 June 1920, Chapter VI, arts. 5 and 6. The Quebec Civil Code Revision Office, Committee on the Law of Persons and the Family, has recommended that a similar system be introduced: Report on the Protection of the Family Residence (XII, 1971).

56. See, generally, B.D. Inglis, Family Law, Vol. 1 (2nd ed. 1968) Chap. IX; Vol. 2. (2nd ed. 1970) pp.343-344.

57. The grounds on which an order may be made are set out in section 19.

58. Under s.2 "'furniture' includes household appliances and effects; and also includes furniture and household appliances and effects that are in the possession of a husband or wife pursuant to a hire-purchase agreement or to an agreement for lease or hire."

by imprisonment or by a fine.

2.30 In Part 1 of the Paper,[59] we referred to the wide discretionary powers given to the court by the New Zealand Matrimonial Property Act 1963, as amended. These powers apply whenever there is a dispute between the spouses concerning property; the court may make such order as appears just, notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.[60] Under section 44 of the Domestic Proceedings Act 1968, on making a separation order under that Act the court may make an order under section 5 of the 1963 Act granting to either spouse the right, to the exclusion of the other party, to occupy the matrimonial home or to possession of the furniture.

2.31 Section 40 of the Domestic Proceedings Act 1968 gives the court power to make an order vesting certain tenancies in either party where there has been a separation order or where the parties are living apart. Where a vesting order is made the court may also grant possession of the furniture to the party in whose favour the order is made.[61] The court may direct that notice be given to interested third parties.

(c) The Morton Commission

2.32 The Royal Commission on Marriage and Divorce considered the rights and obligations of the spouses in respect of the matrimonial home and its contents after breakdown of

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59. Paras. 1.53 ff. above.

60. s. 5(3); s. 6(2) provides that s. 5(3) shall not be used to defeat any common intention of the spouses.

61. ss. 40 and 42.

marriage and after a decree of divorce, nullity or judicial separation.[62] They dealt with occupation rights and with the ownership, use and enjoyment of the contents of the home. Their principal recommendations relating to the matrimonial home and its contents were as follows:

(a) A spouse who leaves the other spouse in the matrimonial home should not be able to turn out the other spouse or take away any of the essential contents without a court order, and the other spouse should be able to apply for an order to prevent that spouse from doing so.[63]

(b) If one spouse leaves the other in the matrimonial home and fails to pay the mortgage instalments or the instalments under a hire-purchase agreement relating to any of the essential contents, the other spouse should be entitled to tender (and have accepted) the payment; either spouse should then be able to apply to the court for an order as to the disposition of the house or contents.[64]

(c) On a decree of divorce, nullity or judicial separation, the court should have power to make an equitable division of the contents of the home (including articles being bought on hire-purchase).[65]

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62. Cmd. 9678, para. 662 ff.

63. Para. 685.

64. Para. 686.

65. Para. 697 (iii).

(d) On the institution of proceedings for divorce, nullity or judicial separation, the petitioner should be able to apply for an order restraining the other spouse from disposing of any interest in the home or its contents.[66]

2.33 The Morton Commission's recommendations concerning rights of occupation in the matrimonial home were implemented, in a modified form,[67] by the Matrimonial Homes Act 1967, which was considered in Part 1 of the Paper. Under the Matrimonial Proceedings and Property Act 1970, the court's powers to order financial provision on a decree of divorce, nullity or judicial separation include power to order the transfer or settlement of any property of either spouse to or for the benefit of the other spouse or any child of the family. These powers go beyond those recommended by the Morton Commission in respect of the essential contents, since they apply to all classes of property and include children as possible beneficiaries.

2.34 Although the recommendations of the Morton Commission concerning the use and enjoyment of the contents of the home are framed in general terms, and although there are problems and difficulties which they leave unresolved, they could, in our view, serve as the basis for a system relating to household goods parallel to the Matrimonial Homes Act 1967.

(d) A system of protection

2.35 There is seldom any problem of identifying the matrimonial home itself, since few married couples have

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66. Para. 698.

67. One important change is that the protection provided by the 1967 Act does not depend on one spouse leaving the other in the home.

more than one home at any one time.[68] But opinions may vary as to what are the household goods. Most people would probably accept that the furniture, carpets, curtains, linen, kitchen and laundry equipment were part of the household goods. On the other hand each spouse's clothing, jewellery, equipment used for sports or hobbies (a tennis racket, a camera, etc.) would probably be regarded as personal to that spouse. Between, there is a range of items which might be hotly contested: for example, paintings and other objets d'art, hi-fi equipment, gramophone records, books, television and radio. We exclude goods which are not normally used inside the home or garden even though kept there: for example, a car, a motor-cycle, or other vehicle. These are considered separately below.

2.36 The Morton Commission did not expressly define the contents of the home. They referred, in general terms, to "such furniture and equipment ... as is essential for the running of the home."[69] Obviously, the circumstances of the spouses in each case, including their means, will be relevant in deciding what is essential. Ideally, the household goods should be defined precisely enough to allow the spouses to manage their affairs with some certainty, and to guide the court in the exercise of its discretion. Provisionally, we think that they should include furniture and effects used in or reasonably necessary to the running of the home. The overall objective of any definition should be to make the protection of occupation rights effective. In particular cases the decision as to what is or is not household goods should be made by having regard to the spouses' standard of living, their resources available to replace any item, and

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68. Where there is more than one home, the Matrimonial Homes Act 1967, s. 1, applies to both, but a spouse is not entitled to register more than one charge: s. 3.

69. Cmd. 9678, para. 674. Under the New Zealand Domestic Proceeding Act 1968, s. 2, "furniture" includes household appliances and effects.

the needs, health and welfare of the spouses and children. Categories which ought, in our view, to be excluded are purely personal items and goods used by a spouse for business purposes.

2.37 As we have seen, the Morton Commission recommended that a spouse who left the other spouse in the home should not be able to take away any of the essential contents without an order of the court.[70] In our view this recommendation does not go far enough; it would not, for example, cover cases where a husband, being the owner of the home and household goods, removed the goods before leaving, or expelled his wife and then removed the goods. In both these situations the wife has rights of occupation under the Matrimonial Homes Act 1967 - in one case a right not to be excluded without leave of the court, and in the other a right with leave of the court to re-enter. In our view the right of each spouse to the continued use and enjoyment of the household goods should be similarly protected by a provision to the effect that a spouse in occupation of the home is entitled to the continued use and enjoyment of the household goods until that right is terminated by a court order. Such a provision would reinforce a spouse's occupation rights under the Matrimonial Homes Act 1967 and would link use and enjoyment of the household goods to occupation of the home.

2.38 To be effective, the right to the use and enjoyment of the household goods should be supported by a procedural remedy.[71] In order to preserve the status quo, it should be provided that, whenever a spouse has made an application under section 1 of the Matrimonial Homes Act 1967, until the application has been determined neither spouse should be entitled to remove any of the household goods without the

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70. Cmd. 9678, para. 685 (a); para. 2.32 above.

71. We do not envisage a penal sanction such as that introduced in New Zealand: para. 2.29 above.

consent of the other spouse or leave of the court. The court, on dealing with the application, should have power to make orders concerning the use and enjoyment of the household goods.

2.39 An issue between the spouses concerning the household goods could arise independently of any dispute concerning the occupation of the matrimonial home; for example, a spouse who is left in occupation of the home has, in general, no need to apply under the 1967 Act, but may wish to prevent the other spouse from disposing of or removing any of the household goods, or to make the other spouse return any goods removed by him or her. Because of this it should be possible for a spouse to apply to the court at any time for an injunction or for an order concerning the use and enjoyment of the household goods.

2.40 It would be ideal if such matters could be dealt with by the court hearing applications for maintenance, since use and possession of the household goods is part of maintenance.[72] However until such time as a fully integrated system of family courts is introduced we think it will prove more convenient and less expensive for the jurisdiction to be exercised by the county court, which already has power to deal with applications under the Matrimonial Homes Act 1967 and under section 17 of the Married Women's Property Act 1882.

2.41 The court should, in our view, apply the same criteria and have regard to the same matters as in an application concerning occupation rights under the Matrimonial Homes Act 1967, section 1(3) of which provides that:

> "the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case ..."

72. This is the position in New Zealand: paras. 2.30 and 2.31 above.

2.42 Without intending to limit the court's powers, it seems that the orders which the court is empowered to make should include the following:

(a) an order requiring either spouse to allow the other spouse to have the use and enjoyment of the household goods, (which could, in some cases, be simply identified by reference to the house which contains them);

(b) an order restraining either spouse from removing the household goods from the use and enjoyment of the other spouse or from making any disposition with the intention of depriving the other spouse of their use and enjoyment;

(c) an order requiring a spouse to restore or deliver the household goods to the other spouse;

(d) an order regulating or terminating the right of either spouse to the use and enjoyment of any of the household goods.

It should, of course, be possible to limit an order to particular items rather than to the "household goods" as such. We envisage that applications for orders would, where possible, be accompanied by a schedule of the items concerned. As in the case of the matrimonial home, the court should have power to make the order for such period and on such terms as may seem appropriate.[73]

2.43 In Part 1 we proposed that when a marriage is terminated by a decree of divorce or nullity or on a judicia separation the court should have power to deal with the occupation of the home as part of its powers to deal with

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73. Matrimonial Homes Act 1967, s. 1 (3) and (4).

financial provision.[74] A similar proposal was made with regard to the court's powers on an application for family provision. As far as the household goods are concerned we think the same rule should apply. Powers to deal with the use and enjoyment of the household goods would supplement the court's powers to order transfers or settlements of property.

(e) The car

2.44 We have already indicated[75] that we do not include a car or other vehicle within the definition of the household goods. Unlike those goods, the car is not used in or about the home even though it may be kept there. Further, it often has a substantial resale value, and may be the most valuable asset owned by any member of the family. But it is not always used by both husband and wife, or to the same extent by each, and sometimes one spouse may need it for business purposes, including travel to and from work. For this reason we do not consider it appropriate to apply to the car or other vehicle a provision that the spouse in occupation of the home is entitled to its continued use and enjoyment until court order. Nevertheless, there are cases where the car is necessary to the running of the home, and others where a spouse, though not the owner, may have a just claim to the use and enjoyment of the car. We therefore propose that the rules outlined above[76] should apply to the car or other vehicle owned by either spouse, so that either spouse could make an application to the court for orders concerning its use and enjoyment.

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74. Para. 1.18 above.

75. Paras. 2.3 and 2.35

76. Paras. 2.39-2.43.

(f) Household goods and third party interests

2.45 Where the household goods are not owned by a spouse, but are held under a hire-purchase agreement there would be certain difficulties in applying the proposals made above.[77] As we have seen, the Crowther Committee recommended important changes in the laws relating to consumer credit.[78] If implemented, their effect would be that the purchaser on credit would normally become the beneficial owner of the goods and would be able to dispose of his interest, subject to the lender's security interest in the goods. The lender would be able to take possession only in certain cases, and with leave of the court. Even where a lender retained a security interest, a bona fide third party purchaser would be able to acquire a good title free of that interest. If the beneficial interest in goods purchased on credit always vested in the purchaser, there would be little difficulty in principle in applying the proposals made above. Nevertheless certain special rules may be needed to cover cases where a third party has a security interest in the goods, or where there is an outstanding debt incurred in respect of any item.

2.46 An example of the situation we have in mind is where the husband quits the home leaving the wife in possession of goods being purchased on credit. He has no further interest in paying the instalments though he is not, of course, discharged from his contractual obligations; his wife may be able to get an order preventing him from removing the goods, or, as part of her maintenance, an order directing him to pay her enough to keep up the instalments. The chief concern of the original vendor/lender is to receive the instalments and to know against whom he may proceed in case

77. The New Zealand legislation referred to above, expressly applies to goods held under hire-purchase agreements: n. 58 above.

78. Paras. 2.20-2.21 above.

of default. The wife is interested in retaining the use of the goods and, therefore, in preventing them from being removed.

2.47 It is difficult to formulate precise proposals for dealing with this situation until the Crowther Committee's recommendations have been implemented. However, we set out below the general principles which should, in our view, be applied to credit transactions after the implementation of those recommendations.

(a) The proposals made in paragraphs 2.37 to 2.44 should apply in principle to all household goods, including those subject to a credit transaction, but without prejudice to third party interests.

(b) Where a third party has a security interest in respect of any item forming part of the household goods, the spouse in possession of that item should be entitled to pay instalments due under the credit agreement, and the third party should be obliged to accept those payments.[79]

(c) The spouse in possession of any item forming part of the household goods should be entitled to receive notice of and to apply to be joined as a party to any proceedings by a third party against the other spouse for repossession of the goods, and to rely on any defence which would have been available to the spouse who had entered into the credit agreement with the third party.

(d) On an application by one spouse against the other spouse concerning the use and possession of any item in respect of which

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79. cf. Matrimonial Homes Act 1967, s. 1(5).

a third party has a security interest the court should be empowered to order either spouse to discharge any liabilities in respect of that item;[80] but such order should be effective only between the spouses and should not impose any liability on a spouse directly enforceable by a third party, nor should it relieve a spouse of any liability to a third party under a credit agreement.

2.48 The above rules could, in oure view, form the basis of a practical solution in cases where a third party had a security interest in the household goods. There are several ancillary matters which would have to be considered. First, payments made by one spouse in respect of goods purchased by the other on credit might give rise to a beneficial interest in the goods.[81] Secondly, on a decree of divorce, judicial separation or nullity the court would have power to transfer the ownership of property from one spouse to the other. It might be appropriate to consider whether, at that stage, the liability under the credit agreement should be transferred so as to make the transferee spouse directly liable to the third party.[82]

2.49 We have not dealt with the special problems which would arise in connection with old style hire-purchase agreements. The rules outlined above would need modification. For example, the right to exercise the option to purchase is personal to the spouse who entered into the agreement, and is not usually assignable; provision would

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80. cf. Matrimonial Homes Act 1967, s. 1(3)(c).

81. cf. Matrimonial Homes Act 1967, s.1(5).

82. cf. Matrimonial Homes Act 1967, s. 7 under which the court may transfer protected tenancies.

probably have to be made to allow the spouse in possession to exercise the option as agent for the other spouse. If the recommendations of the Crowther Committee are implemented these questions need not be considered.

5 SUMMARY OF PROPOSALS

2.50 For the reasons given in this Paper it is our view that it is more important at this stage to protect the use and enjoyment by a spouse of the household goods than to alter the rules concerning ownership (para. 2.26). With this objective we make the following preliminary proposals:

(i) A spouse in occupation of the matrimonial home should be entitled to the continued use and enjoyment of the household goods until that right is terminated by a court order (para. 2.37).

(ii) Where a spouse has made an application under section 1 of the Matrimonial Homes Act 1967, until the application has been determined neither spouse should be entitled to remove any of the household goods without the consent of the other spouse or leave of the court (para. 2.39).

(iii) The county court should have power to make orders concerning the use and enjoyment of the household goods on the application of either spouse in separate proceedings or in proceedings under section 1 of the Matrimonial Homes Act 1967 (paras. 2.39 and 2.40).

(iv) In determining an application relating to the use and enjoyment of the household goods the court should have regard to the same criteria as those laid down by section 1(3) of the Matrimonial Homes Act 1967 (para. 2.41).

(v) On an application relating to the use and enjoyment of the household goods, the orders which the court is empowered to make should include the following:

(a) an order requiring either spouse to allow the other spouse to have the use and enjoyment of the household goods;

(b) an order restraining either spouse from removing the household goods from the use and enjoyment of the other spouse or from making any disposition with the intention of depriving the other spouse of their use and enjoyment;

(c) an order requiring a spouse to restore or deliver the household goods to the other spouse;

(d) an order regulating or terminating the right of either spouse to the use and enjoyment of any of the household goods. (para. 2.42).

(vi) On granting a decree of divorce, nullity or judicial separation the court's powers to make orders for financial provision should include power to make orders concerning the use and enjoyment of the household goods; similar powers should be exercisable by the court on an application for family provision (para. 2.43).

(vii) Proposals (iii) (iv) (v) and (vi) above should apply to a car or other vehicle owned by either spouse (para. 2.44).

(viii) On implementation of the recommendations of the Committee on Consumer Credit, the following general principles should apply to household goods subject to credit transactions in addition to proposals (i) to (vii) above:

(a) Where a third party has a security interest in respect of any item forming part of the household goods the spouse in possession of that item should be entitled to pay instalments due under the credit agreement, and the third party should be obliged to accept those payments.

(b) The spouse in possession of any item forming part of the household goods should be entitled to receive notice of and to apply to be joined as a party to any proceedings by a third party against the other spouse for repossession of the goods, and to rely on any defence which would have been available to the spouse who had entered into the credit agreement with the third party.

(c) On an application by one spouse against the other spouse concerning the use and possession of any item in respect of which a third party has a security interest the court should be empowered to order either spouse to discharge any liabilities in respect of that item, but such order should be effective only between the spouses and should not impose any liability on a spouse directly enforceable by a third party; nor should it relieve a spouse of any liability to a third party under a credit agreement (para. 2.47).

PART 3

FAMILY PROVISION

1 INTRODUCTION

3.1 In the General Introduction the point was made that property rights and support rights are complementary. A wife with property rights in the family assets will have less need to rely on support rights; a wife who successfully enforces support rights against her husband may obtain either the ownership or the use of some of his property. The relationship between support rights and property rights is of particular importance when a marriage ends in death. There is a contrast between the position on intestacy and the position where the deceased leaves a will.[1]

1. "Seen in a comparative context, the English law of succession is characterised not only by the generosity with which it treats the surviving spouse in the event of intestacy but also by its reluctance to give her or him adequate protection in the event of the exercise by the predeceasing spouse of his or her freedom of testation in a manner adverse to the interests of his or her spouse and children": Kahn-Freund "Recent Legislation on Matrimonial Property" (1970) 33 M.L.R. 601, 602.

3.2 When a deceased leaves no will, the rules of intestate succession[2] lay down how the estate is to be distributed:

(a) If the deceased leaves children or their issue, the surviving spouse is entitled to the "personal chattels"[3] of the deceased, to a fixed net sum of £8,750 and to a life interest in half the balance of the estate. The children take the rest, including the remainder after the life interest.

(b) If there are no children or their issue, but certain other close relatives (i.e. parents, brothers and sisters or their issue), the surviving spouse is entitled to the "personal chattels", to a fixed net sum of £30,000 and to half the balance.

(c) If the deceased leaves no such close relatives and no children or their issue, the surviving spouse is entitled to the whole estate.

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2. The Intestates' Estates Act 1952, as amended by the Family Provision Act 1966. The 1952 Act was based on the Report of the Committee on the Law of Intestate Succession, Cmd. 8310 (1951). The Committee's recommendations were influenced to a large extent by statistics showing how testators had disposed of estates of different sizes (see para. 18). Under the Administration of Estates Act 1925, if the deceased left close relatives the only capital sum given to the surviving spouse was £1,000. The Intestates' Estates Act 1952 increased this £5,000 if the deceased left children, and to £20,000 if there were no children but certain other close relatives. These sums were increased to the present amounts by the Family Provision Act 1966.

3. "Personal chattels", include virtually all goods (but not money) owned by the deceased other than items used in connection with a business: see para. 2.14 above.

If the matrimonial home forms part of the intestate estate the survivor is entitled to require that it be appropriated in satisfaction of his or her interest in the estate.

3.3 When a deceased leaves a will which either ignores or fails to meet adequately the needs of the surviving spouse or a former spouse, the survivor, under present law, has no fixed proprietary rights in the estate, but may apply to the court for family provision on the ground that the deceased failed to make reasonable provision for his or her maintenance. An application by a surviving spouse is made under the Inheritance (Family Provision) Act 1938.[4] The children of the deceased may in certain cases apply under the same Act. An application by a former spouse of the deceased for provision from the estate is made under sections 26-28A of the Matrimonial Causes Act 1965. In this part we consider the general aims and scope of family provision legislation and the powers of the court; in particular, we consider possible measures to prevent avoidance of family provision law by inter vivos dispositions.

(a) Jurisdiction

3.4 Although the Paper is chiefly concerned with the mutual rights and obligations of the spouses, the interests of all classes of dependants (i.e. the surviving spouse, a former spouse or children) of a deceased are so closely connected that they must be considered together. We therefore deal with the whole law of family provision. A general conclusion we have reached is that this law should be included in one Act and administered by one court. At present jurisdiction under the 1938 Act is exercised by the

4. As amended by the Intestates' Estates Act 1952, the Family Provision Act 1966, and the Law Reform (Miscellaneous Provisions) Act 1970. The 1938 Act was based on legislation introduced in New Zealand: the Family Protection Act 1908, now the Family Protection Act 1955.

Chancery Division whereas that under the 1965 Act is exercised by the Divorce Division.[5] This can lead to the result that a divorced wife must apply to one court whereas her children must apply to another court, and that the former wife must apply to one court and the widow to another. Although it is possible for an application to be transferred from one division of the High Court to another, so that all the applications can be heard together, it would be preferable if all applications had to be made in the same Division.

3.5 The creation of the new Family Division by the Administration of Justice Act 1970 would have provided an opportunity to assign all the family provision jurisdiction to one court. Nevertheless, for reasons which are difficult to understand, the former allocation of jurisdiction has been maintained.[6] Only cases under the 1965 Act have been transferred to the Family Division. The surviving spouse and children of the deceased must still apply to the Chancery Division. In our view, the jurisdictions are essentially the same, and should be administered by one court, with power to take into account the interests of all persons entitled to apply for family provision. We therefore propose that jurisdiction under the 1938 Act be transferred to the Family Division. The county court should continue to have its present jurisdiction.[7]

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5. In the case of net estates under £5,000 application under either Act may be made to the county court: Family Provision Act 1966, s.7.

6. An amendment which would have had the result of transferring proceedings under the 1938 Act to the Family Division was defeated on the Report stage of the Administration of Justice Bill: H.C. Deb. Vol. 801, cols. 109-117 (4 May 1970).

7. See above, n.5.

(b) Family provision and property rights

3.6 The aim of the present family provision legislation is to ensure that reasonable provision is made for the maintenance of the widow or widower, the former spouse and certain categories of children. If the court is of the opinion that the disposition of the deceased's estate is not such as to make reasonable provision for the maintenance of a dependant it may order that such reasonable provision as it thinks fit be made out of the deceased's estate, by way of periodical payments or by a lump sum, or both. The right to apply for family provision is a right to be supported. However, family provision law need not remain confined to such a role. It would be possible to alter its objective so that it could be used to secure for the surviving spouse ownership of a fair share of the family property. A surviving spouse could be given the right to apply to the court not merely for maintenance but for a reasonable share of the other's estate to be transferred to her. If extended in this way family provision legislation would become a means of securing property rights to a survivor and could be considered as an alternative to the systems of legal rights of inheritance and community of property discussed in parts 4 and 5.

3.7 A possible advantage of a system of family provision law thus extended as compared with systems of fixed rights of inheritance or community of property is that the court would be able to take account of the circumstances in each individual case. For example, the court could exercise its discretion so as to prevent an undeserving spouse from acquiring a share, or a substantial share, of the deceased's estate. Another possible advantage might be that property rights would be conferred on a surviving spouse by the extension of a known and tried procedure instead of by the introduction of a method previously unknown to English law. We consider these advantages to be outweighed by two major disadvantages, namely, that the survivor's rights would

still be dependent on the discretion of the court and that great uncertainty, involving litigation and expense, would be introduced into the administration of estates.

3.8 The uncertainty would arise from the large number of cases in which a will could be challenged by the surviving spouse. Under the present law there are comparatively few applications for family provision.[8] But if a survivor were entitled to claim a fair share of the estate, then even the common form of will under which the deceased left all his property to his wife for life and then to his children could be brought before the court on the ground that the widow wanted a share of the capital. Further, when a will was examined by the court it would be difficult to determine what would be a fair or reasonable share of the estate. On divorce the needs of both parties have to be considered, and the share of the husband's assets awarded to the former spouse is necessarily limited by this fact. On death there would be no such limitation, but the court might have to consider questions such as how far the wishes of the testator, as expressed in his will, should be allowed to prevail, how far bequests to children should be given special consideration and how far any claim for maintenance by any other applicant for family provision should be taken into account.

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8. In 1970 there were, in the county court, 77 applications under the 1938 Act, and 26 applications under s.26 of the 1965 Act; the figures for 1969 were 64 and 7. No figures are available for High Court applications under the 1938 Act, but there were 45 applications in 1970 under s.26 of the 1965 Act. All these figures are from the Civil Judicial Statistics for 1970, Cmnd. 4721.

3.9 Under the present family provision law these difficulties are minimised by the overriding criteria which limit the court to ordering reasonable provision for the maintenance of the applicant. If the court had power to award the survivor a fair share of the estate it would be open to any survivor who had received less than would have been received on intestacy to claim that he or she had not had a fair share. For all these reasons our provisional conclusion is that family provision should not be extended so as to secure for the survivor a fair share of the estate, and that its purpose should remain that of securing reasonable provision for the maintenance of dependants. We should welcome views on the question.

(c) Family provision and financial provision

3.10 The relief available to the spouse and children of a deceased person compares unfavourably with the relief available to a spouse and children after a decree of divorce, nullity or judicial separation. This is largely the result of differences in the courts' powers to deal with property. The contrast has been made more pronounced by the Matrimonial Proceedings and Property Act 1970.[9] There are, of course, differences in the objectives aimed at. The court's powers to order financial provision on a decree of divorce, nullity or judicial separation can be used to effect an equitable allocation of the property of the spouses, whereas the objective of family provision is to secure reasonable provision for the maintenance of the survivor. However, in the General Introduction we stressed the complementary nature of support rights and property rights. It is our view that for the effective enforcement of support rights the court should have the widest possible recourse to the property of a spouse, and that the court's powers to deal with assets ought to be as wide on death as they are on divorce.

9. See F.S. Hopkins, "Family Provision on Death" (1971) 35 Conv. 72, 80-81.

3.11 The analogy between financial provision on a decree and family provision after the death of a spouse, although useful in connection with powers to deal with property, should not be applied too rigidly because of the different circumstances. In the case of divorce, nullity and judicial separation not only is litigation already in progress but it is more likely that justice will not be done unless the court intervenes to make an order. When a marriage has ended with death the deceased will normally have fulfilled his obligations to his family; only in a small minority of cases will a system of family provision need to be invoked. Another difference is that on a family provision application the needs of the deceased spouse no longer have to be considered, though it will be necessary for the court to take into account the interests of the beneficiaries. Although we have regard to the Matrimonial Proceedings and Property Act 1970 and the Report on which it was based, these differences must be taken into account where relevant.

2 APPLICATIONS BY SURVIVING SPOUSE OR FORMER SPOUSE

(a) Basis of application

3.12 Under the Inheritance (Family Provision) Act 1938, section 1, the wife or husband of a deceased may apply to the court for maintenance from the estate.[10] The court may make an order if it is of the opinion that the disposition of the deceased's estate made by his will or the law relating

10. Under the Law Reform (Miscellaneous Provisions) Act 1970, s.6, a person who had in good faith entered into a void marriage with the deceased may, if he has not remarried, apply for maintenance as a dependant under the 1938 Act. If the marriage had been dissolved or annulled during joint lives the application must be made under section 26 of the 1965 Act.

to intestacy is not such as to make reasonable provision for the maintenance of the survivor.

3.13 Under the Matrimonial Causes Act 1965, section 26, a former spouse whose marriage with the deceased was dissolved or annulled during the lifetime of the deceased and who has not remarried, may apply for maintenance from the estate on the ground that the deceased has not made reasonable provision for his maintenance. The court may make an order if it is satisfied:

(a) that it would have been reasonable for the deceased to make provision for the survivor's maintenance; and

(b) that the deceased has made no provision, or has not made reasonable provision, for the survivor's maintenance.

3.14 If satisfied that reasonable provision has not been made for a dependant, the court may order that such reasonable provision as it thinks fit be made out of the deceased's net estate for the maintenance of that dependant, subject to such restrictions or conditions as it may impose.[11] We have already expressed the provisional view that the objective of family provision law should remain that of making reasonable provision for the maintenance of dependants and we do not, therefore, propose any change in the present grounds of application or basis of jurisdiction.

3.15 The court must determine first, under the 1965 Act, whether it would have been reasonable for the deceased to have made provision for the survivor, and secondly, under both Acts, whether reasonable provision has in fact been made by the deceased for the survivor. The 1938 Act

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11. 1938 Act, s.1(1); 1965 Act, s.26(2).

was construed in some cases as meaning that an order could be made only if the deceased had acted unreasonably,[12] but now it appears to be established that the test to be applied both under the 1938 Act and the 1965 Act is whether, in the opinion of the court, the provision made by the deceased for the applicant is in fact reasonable.[13] Megarry J. in Re Goodwin expressed the appropriate test as follows:[14]

> "In my judgment the question is not subjective but objective. It is not whether the testator stands convicted of unreasonableness, but whether the provision in fact made is reasonable."

This, in our view, is the correct approach and if any doubt remains, it should be removed in the proposed new legislation. It should also be made clear that the court may take into account any change in circumstances which has arisen since the date of death and consider the relevant facts as at the date of the hearing of the application.[15]

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12. Re Brownbridge (1942) 193 L.T. Jo. 185; Re Styler [1942] Ch. 387, 389; Re Inns [1947] Ch. 576; Re Howell [1952] Ch. 264 and [1953] 1 W.L.R. 1034 (C.A.); Re E [1966] 1 W.L.R. 709.

13. Re Goodwin [1969] 1 Ch. 283; Re Gregory [1970] 1 W.L.R. 1455 (C.A.); Re Shanahan (1971) 115 Sol. J.687.

14. [1969] 1 Ch. at 288. See Tyler, Family Provision (1971) p.39; Hopkins, "Family Provision on Death" (1971) 35 Conv. 72.

15. See Re Goodwin [1969] 1 Ch. 283, 289-290 per Megarry J.: " I am entitled to take supervening events in to account in so far as they quantify an uncertainty ... at the date of the testator's death."

(b) Matters to be considered by the court

3.16 In deciding whether the deceased has made reasonable provision for his spouse or former spouse and, if not, what provision if any should be made, the court must have regard, among other things, to:

(a) the past, present or future capital of the survivor and to any income of the survivor from any source;[16]

(b) the survivor's conduct in relation to the deceased and otherwise;[17] and

(c) any other matter or thing which, in the circumstances of the case,the court may consider relevant or material in relation to the survivor , persons interested in the estate of the deceased or otherwise.[18]

There is also a direction that "the court shall have regard to the nature of the property representing the deceased's net estate and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the deceased's dependants and of the person who, apart from the order, would be entitled to that property."[19] The same criteria are applied whether the applicant is a man or a woman. The better view is that

16. 1938 Act, s.1(6); 1965 Act, s.26(4)(a).

17. 1938 Act, s.1(6); 1965 Act, s.26(4)(b).

18. 1938 Act, s.1(6); 1965 Act, s.26(4)(d).

19. 1938 Act, s.1(5); cf. 1965 Act, s.26(5).

there is no greater onus on a surviving husband than on a surviving wife;[20] but an application by a husband is comparatively rare because the family property is more likely to be owned by the husband.

3.17 In our Report on Financial Provision in Matrimonial Proceedings,[21] we recommended that a uniform set of guidelines should be introduced "to which the court should have regard when exercising all or any of its armoury of powers [to order financial provision] on the grant of a decree of divorce, nullity or judicial separation". The guidelines are now enacted in section 5(1) of the Matrimonial Proceedings and Property Act 1970.[22] Although, as we have pointed out, the circumstances on death differ in some ways from those on divorce,[23] and there are certain matters which would be relevant in one set of proceedings only, we consider that the criteria applied by the court in each case should correspond as far as possible. We have taken section 5(1) as the starting point, and set out below, with such modifications as are required, the matters to which we think the court should have regard in applications for family provision by a spouse or former spouse.

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20. Re Clayton [1966] 1 W.L.R. 969; see also Re Wilson (1969) 113 Sol. J. 794. For the view that a widower's claim should be more critically regarded, see Re Sylvester [1941] Ch. 87.

21. Law Com. No. 25 (1969) paras. 81-83. For the principles applied prior to the new legislation see Attwood v. Attwood [1968] P. 591 (D.C.); Roberts v. Roberts [1970] P. 1 (D.C.); Porter v. Porter [1969] 1 W.L.R. 1155 (C.A.).

22. s.5(1) is set out in the Appendix, below, p. 326.

23. Paras. 3.10-3.11 above.

(a) The income, earning capacity, property and other financial resources which any applicant for family provision[24] has or is likely to have in the foreseeable future [25]

It should be left to the court how far to take into account any social security benefits received by an applicant.[26]

(b) The financial needs, obligations and responsibilities which any applicant for family provision has or is likely to have in the foreseeable future[27]

(c) The financial resources and financial needs of any beneficiary of the estate of the deceased who would be entitled to apply for family provision

(d) The obligations and responsibilities of the deceased towards any applicant for family provision and any beneficiary of the estate of the deceased[28]

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24. The words "any applicant for family provision" are used to indicate that the court must have regard to the position of any child who has applied for family provision as well as to the position of the spouse or former spouse. For applications by children see para.3.34 ff. below.

25. This corresponds with the Matrimonial Proceedings and Property Act 1970, s.5(1)(a); cf. 1938 Act, s.1(6), and 1965 Act, s.26(4)(a) para.3.16 above.

26. See Re Watkins [1949] 1 All E.R. 695; Re E.[1966] 1 W.L.R. 709; Re Clayton [1966] 1 W.L.R. 969; Re Canderton (1970) 114 Sol. J. 208. For Australian decisions on this point, see Wright, Testator's Family Maintenance in Australia and New Zealand (2nd ed. 1966) pp.42 and 117.

27. cf. Matrimonial Proceedings and Property Act 1970, s.5(1)(b).

28. cf. Matrimonial Proceedings and Property Act 1970, s.5(1)(b).

3.18 There are several cases in which the court has balanced the interests of an applicant against those of beneficiaries of the deceased under his will or on an intestacy. Those beneficiaries may also be "dependants" of the deceased in the sense that they, too, would be qualified to apply for maintenance from the estate; for example, on an application by a former wife for maintenance, where the whole estate was left to the widow or children of the deceased.[29] In other cases the court has had to consider the interests of beneficiaries who are not "dependants" entitled to apply for maintenance under the present law, but to whom the deceased may have had a moral obligation.[30] In our view, the emphasis should be on the extent of the deceased's obligation to them rather than on preserving their interests in the estate.[31] We consider that the new criteria proposed will help to achieve this result.

(e) The size and nature of the estate

(f) The age of the surviving or former spouse and the duration of the marriage[32]

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29. Re Eyre [1968] 1 W.L.R. 530 (former wife v. widow); cf. Re Brownbridge (1942) 193 L.T. Jo. 185 (widow v. son); Re Styler [1942] Ch. 387 (widow v. daughter); Re Bellman [1963] P.239 (former wife v. daughter); Roberts v. Roberts [1965] 1 W.L.R. 560 (1st wife v. 2nd wife).

30. Re Lidington [1940] Ch. 927, Re Vrint [1940] Ch. 920, and Re Joslin [1941] Ch. 200 (widow v. "other woman"); Re Pugh [1943] Ch. 387 (widow v. grandson); Re Borthwick [1949] Ch. 395 (wife and child v. charity); Re Harker-Thomas [1969] P.28 (former wife v. sister and nephews etc.).

31. In Re Harker-Thomas, n.30 above, the claims of next of kin including sister, nephews and nieces, taking on intestacy were held to prevail over those of the former wife applicant.

32. Matrimonial Proceedings and Property Act 1970, s.5(1)(d); cf. Porter v. Porter [1969] 1 W.L.R. 1155 (C.A.). Length of marriage may be more relevant in the case of a former spouse than in the case of a surviving spouse.

(g) Any physical or mental disability of the surviving or former spouse[33]

(h) The contributions made by the surviving or former spouse to the welfare of the family, including any contribution made by looking after the home or caring for the family.[34]

(i) The conduct of the surviving or former spouse in relation to the deceased and otherwise.[35]

3.19 The court already considers the way in which an applicant has fulfilled his or her marital obligations in assessing the extent of that party's moral claim on the deceased.[36] This criterion emphasises the fact that conduct during the whole marriage must be considered, not just, for example, conduct leading to a breakdown of marriage.

(j) Previous applications by the surviving or former spouse for financial provision and orders made thereunder.

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33. Matrimonial Proceedings and Property Act 1970, s.5(1)(e).

34. Matrimonial Proceedings and Property Act 1970, s.5(1)(f). Report on Financial Provision in Matrimonial Proceedings, Law Com. No. 25, paras. 81-83.

35. cf. Matrimonial Proceedings and Property Act 1970, s.5(1).

36. Roberts v. Roberts [1965] 1 W.L.R. 560, 566.

3.20 Under the 1965 Act, section 26(4)(c) the court is directed to have regard to any application by a former spouse during the lifetime of the deceased for maintenance in the divorce or nullity proceedings, and to the order made (if any) or to the circumstances appearing to be the reason why no application or no order wad made. We consider that this provision should be extended to applications by a surviving spouse who had applied for maintenance during the lifetime of the deceased.

(k) Other circumstances

3.21 Under both the 1938 Act and the 1965 Act the court is directed to have regard to other circumstances.[37] An example is a decision in which the court took into account the source from which the deceased's property had been derived.[38] Another circumstance which might be relevant is the standard of living previously enjoyed by an applicant.[39]

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37. ss. 1(6) and 26(4)(d) respectively; see para. 3.16 above

38. Re Sivyer [1967] 1 W.L.R. 1482; Re Styler [1942] Ch. 387: the second husband's application was dismissed when the estate, derived from the first husband, was left to a child of the first marriage.

39. cf. Matrimonial Proceedings and Property Act 1970, s.5(1)(c). In Re Inns [1947] Ch. 576 a testator with an estate of £600,000 left his widow insufficient income for her to continue to reside in the house in which he left her a life interest. It was held that he was "not unreasonable"; this, however, is no longer the test, see para. 3.15 above.

(c) The reasons of the deceased

3.22 Under the 1938 Act the court is directed in the following terms to have regard to the reasons of the deceased:[40]

> "The court shall also ... have regard to the deceased's reasons, so far as ascertainable for making the dispositions made by his will (if any), or for refraining from disposing by will of his estate or part of his estate, or for not making any provision, or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient including any statement in writing signed by the deceased and dated, so however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement."

3.23 There are two aspects of this section to consider. First, it appears to lay down that the reasons of the deceased are a separate matter to which the court should have regard, quite indpendently of factors (a) - (k), considered above. This view is supported by authorities which treat the knowledge and state of mind of the testator as one of the material circumstances.[41] Later authorities,

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40. s.1(7).

41. Re Watkins [1949] W.N.125.

however, have held that the reasonableness or otherwise of the testator's dispositions must be tested objectively.[42] We have already indicated that in our view the test should be an objective one. To this extent we agree that "if the testator's reasons are good reasons founded on truth, then they come in under section 1(6) [matters to which the court must have regard], and there is no need to add anything thereto".[43] Our provisional view is that the first part of section 1(7) is unnecessary.

5.24 Section 1(7) also has an evidentiary aspect, in that it allows the court to accept such evidence of the deceased's reasons, including any statement in writing, signed and dated, as it considers sufficient. It is in our view desirable that the court should have available any statement made orally or in writing by the deceased on a matter relevant to its decision. However, it is doubtful whether section 1(7) is necessary for this purpose. The Civil Evidence Act 1968, sections 1, 2(1) and 6(3) appear to deal adequately with the ground covered by

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42. Re Blanch [1967] 1 W.L.R. 987; see also Re Smallwood [1950] Ch. 369, in which the court said that evidence could be given of facts from which the court could infer the reasons of the deceased, and Re Gregory [1970] 1 W.L.R. 1455 (C.A.). A Practice Note [1945] W.N.210 under which it was said that any suggestion of the testator's weakness of mind ought to be excluded was explained by Buckley J. in Re Blanch, at 991, to mean only that "testamentary capacity, or the lack of it, is not a matter which should be investigated on an application under this Act, and that feebleness of mind or understanding cannot constitute a reason for the deceased's conduct which is relevant for the purpose of section 1(7)".

43. Albery, The Inheritance (Family Provision) Act 1938, p.23.

section 1(7). Under section 2(1):

> "In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, ..., shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible".

Under section 6(3):

> "In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 2 ... regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement..."

In these circumstances it seems that no additional purpose is served by section 1(7). We propose that it be repealed.

(d) Orders which the court may make

(i) Existing powers

3.25 The court at present may order maintenance for the survivor by way of periodical payments[44] or a lump sum or both.[45] The order may provide for periodical payments of a specified amount or for payments equal to the whole or part of the income of the net estate or may provide for the amount of the payments to be fixed in any other way the court thinks fit.[46] A sufficient part of the net estate

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44. 1938 Act, s.1(2); 1965 Act, s.26(3).

45. 1938 Act, s.1(4); 1965 Act, s.26(3).

46. 1938 Act, s.3(1A); 1965 Act, s.28(3).

(but no more than is necessary) may be set aside or appropriated to meet the order.[47] There are no longer any restrictions on the court's power to order a lump sum.[48] This power is useful in the case of small estates where a lump sum is the only practicable order.

3.26 Where a marriage has been terminated by a decree of divorce or nullity and the court has made an order for financial provision, a spouse cannot, on a later application to vary that order during joint lives, obtain a lump sum or a variation of a lump sum,[49] though a lump sum may be awarded on an original application for financial provision made after decree.[50] However, we do not think that there is any ground for changing the rule under which a former spouse may be awarded a lump sum on an application for family provision.[51] On the death of the other party there is a new situation. A capital sum might be more readily available, and a lump sum may be the most appropriate way of settling the claim,especially where the estate

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47. 1938 Act, s.3(2); 1965 Act, s.28(3).

48. Former restrictions were removed by the Family Provision Act 1966, s.4.

49. Matrimonial Proceedings and Property Act 1970, s.9(5). If there has been a judicial separation, the court may still exercise its full range of powers on a subsequent divorce.

50. See Williams v. Williams [1971] 3 W.L.R.92, and Powys v. Powys [1971] 3 W.L.R. 154. In the latter case it was held that although the power to order a lump sum is retrospective it should not be exercised when the application, though in the form of an original application, was in substance an application to vary an earlier order for maintenance or secured provision.

51. 1965 Act, s.26(3).

is not a large one.[52]

(ii) Proposed additional powers

3.27 Under the Matrimonial Proceedings and Property Act 1970, section 4, the court has power in proceedings for divorce, nullity or judicial separation to adjust the property of the spouses by ordering the transfer or settlement of any property of either spouse for the benefit of the other spouse or of any child of the family. Ordering the transfer or settlement of specific items of property may be more difficult in family provision proceedings. For instance, the deceased's interest in a specific item of property may have passed under his will to a beneficiary. The court would then have to decide not only whether to transfer it to the survivor, but also whether the beneficiary should bear the whole burden of the order.[53] Nevertheless, there are cases in which it could be argued that the surviving spouse has a justifiable claim to a specific item. Further, it is our view that the effective enforcement of support rights requires the court to have the widest possible powers to allocate or distribute property. The transfer of a specific asset may often be a more convenient way of meeting the survivor's claim than the award of a lump sum, which may entail realisation of assets at an inconvenient or unfavourable time. The power

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52. There is the additional factor that the power to award a lump sum in matrimonial proceedings was introduced by the Matrimonial Causes Act 1963, s.5(1). For a transitional period there will be cases where the applicant for family provision could not have been awarded a lump sum in earlier matrimonial proceedings: see, for example, Re Shanahan (1971) 115 Sol. J. 687, in which a former wife, who obtained a divorce before 1963, was awarded a lump sum in her application under s.26.

53. The court has wide powers to allocate the burden of awards, see Re Preston [1969] 1 W.L.R. 317, 321; para. 3.52 below.

to order a settlement of property would give the court greater flexibility in making its order. For example, it could order the home to be settled on the survivor for life, or until the youngest child reached 18.

3.28 For these reasons we propose that in the exercise of its family provision jurisdiction the court should have power to order the transfer or settlement of any property forming part of the estate of the deceased for the benefit of the surviving spouse.[54] Whether or not this proposal is implemented generally, it is of particular importance that the court be given power to transfer to or settle on the survivor an interest in the matrimonial home, as this is an item in which the survivor has a special interest.[55] We have already proposed that the court should have power to deal with the occupation of the matrimonial home and the use and enjoyment of the household goods in family provision proceedings.[56]

3.29 We also propose that the court should have power to authorise the purchase of property to be settled on the survivor. We envisage that this power could be used in cases where a home did not form part of the estate or where the survivor wished to move to another, perhaps smaller, home.

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54. For proposals concerning the former spouse and children, see below, paras. 3.31 and 3.46.

55. This is recognised by the intestacy rules under which the surviving spouse is entitled to require an appropriation of the matrimonial home in satisfaction of his or her interest in the estate: Intestates' Estates Act 1952, Second Schedule.

56. Paras. 1.24 and 2.43.

3.30 Under section 4(c) and (d) of the Matrimonial Proceedings and Property Act 1970 the court has power to vary any ante-nuptial or post-nuptial settlements made on the parties to the marriage. We have considered whether a similar power should be included in family provision legislation. So far as settlements on the spouses by third parties are concerned, since the death of one spouse (in contrast to divorce) must be regarded as within the contemplation of the settlor, there seems no reason to disturb the settlement. So far as settlements by the deceased are concerned, if they have had the effect of defeating the surviving spouse's application for family provision it may be possible to deal with them under the powers we propose below.[57] If they have not had that effect there does not appear to be any more reason for reopening them than a third party settlement. For these reasons, we do not regard power to vary settlements as essential, but would welcome views on this point.

3.31 In matrimonial proceedings an order for the transfer or settlement of property is final. Once such an order has been made on a decree of divorce or nullity a spouse cannot apply for a further transfer or settlement during the lifetime of the other spouse.[58] We consider, however, that power to transfer and settle property might be useful when the other spouse has died and an application for family provision has been made by the former spouse. The arguments are similar to those in favour of allowing a former spouse to be awarded a lump sum in family provision proceedings. A new situation has arisen, and property might be more readily available for transfer

57. Paras. 3.69-3.75.

58. Matrimonial Proceedings and Property Act 1970, ss. 4 and 9(2). If there has been a judicial separation the court may exercise all its powers to order financial provision on a subsequent divorce.

or settlement. Such powers could be useful where on divorce a husband had given an undertaking that his wife would be allowed to occupy the home and the amount of maintenance payable by him had been reduced accordingly; on his death the court might think it appropriate to award the wife a life interest in the home. We make no proposal on this point, but invite views.

(e) Effect of remarriage

5.52 The present rule is that orders for family provision in favour of a surviving spouse or former spouse cease on the death or remarriage of the payee.[59] This rule also applies to orders for periodical payments made in matrimonial proceedings.[60] There are, however, grounds for distinguishing a remarriage which follows the death of the other spouse from one which follows a decree of divorce or nullity. When a spouse leaves an interest in property to the other spouse by will, it is now less common to make that interest cease on remarriage. The survivor's right to a life interest on an intestacy does not come to an end on remarriage. In many cases the survivor would be elderly; it could be argued that the present rule is unfair in that it automatically deprives the survivor of the interest, even if the remarriage brought no additional sources of income. If it were decided that remarriage should not automatically bring an order to an end, the court would, of course, have power to reduce the payments under the order or even to end them if remarriage had resulted in a change in the circumstances of the survivor. We accordingly propose that remarriage should not automatically bring to an end an order in favour of a surviving spouse under the 1938 Act.

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59. 1938 Act, s.1(2)(a); 1965 Act, s.26(3).

60. Matrimonial Proceedings and Property Act 1970, ss.7(2) and (3). See Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, para. 14.

3.33 The arguments above are directed only to the case of remarriage by the surviving spouse of a marriage subsisting at the time of death. Where the marriage bond had already been severed[61] during the lifetime of the deceased, we consider that the existing rule should remain, namely, that a former spouse who has remarried is not entitled to family provision, whether the remarriage occurred before or after the death. The reasons for this view are fully explained in our Report on Financial Provision in Matrimonial Proceedings.[62]

3 APPLICATIONS BY CHILDREN

3.34 Although we are concerned primarily with the mutual rights and obligations of husband and wife, family provision law also applies to children. We think that comprehensive treatment of this branch of the law is necessary; accordingly we deal in this section with applications by children, and in the following section[63] with applications by other dependants of the deceased.

(a) Children entitled to apply

(i) Existing position

3.35 Under the 1938 Act, section 1(1), the following categories of children may apply for maintenance from the estate of the deceased:

> "(b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself,

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61. Whether by a decree of divorce or nullity.

62. Law Com. No.25, para.14.

63. Para. 3.47 below.

(c) a son who has not attained the age of 21 years,[64]

(d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself"

The definition of "son" and "daughter" includes both adopted and illegitimate children as well as posthumous children of the deceased.[65] As a practical matter, the circumstances in which an application by a child is likely to be made are:

(a) when the will fails to make any provision or reasonable provision for the child; or

(b) on an intestacy, where the rights of the surviving spouse, who may or may not be a parent of the child, have exhausted the estate or left insufficient to provide for the child.

(ii) Proposed extension of definition of children

3.36 A child who is not the deceased's own child or adopted child has no right to claim any share of the estate, either on intestacy or under family provision law. Thus, children of the deceased's spouse, or of third parties, who have been treated as part of the deceased's family, have no rights against the deceased's estate. If a man leaves an illegitimate child, then, even if he never contributed to its support, the child has succession rights on intestacy and is entitled to apply for maintenance from the estate;

64. The age limit of 21 was preserved by s.5 of the Family Law Reform Act 1969 (which lowered the age of majority to eighteen).

65. s.5(1), as amended by the Family Law Reform Act 1969, s.18.

but if a man accepts full responsibility for his wife's children by a previous marriage, without a formal adoption, those children have no rights against his estate.[66]

3.37 Under the Matrimonial Proceedings and Property Act 1970, on granting a decree of divorce, nullity or judicial separation the court may order either spouse to make financial provision for a "child of the family".[67] This category is wider than stepchildren as it includes a child who may not be the child of either party to the marriage, if that child has been treated by both parties as a child of their family. Before making an order against a party in favour of a child who is not the child of that party the court must have regard to all the circumstances relating to the assumption of responsibility for the child by that party.[68]

3.38 On a divorce the court is dealing with the obligations of both spouses towards a child of <u>their</u> family. In the case of death one is concerned with the obligation of the deceased towards the child, which should not depend on whether the deceased <u>and</u> his spouse had treated the child as a child of their family. In our view where the deceased had treated a child as a child of <u>his</u> family that child should be entitled to apply for family provision from the estate, and we so propose. The court should, of course, have regard to all the circumstances concerning the relationship between the child and the deceased, as in the case of divorce.[69]

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66. In contrast, if that man were killed by the negligence of another, a dependent stepchild would be entitled to claim under the Fatal Accidents Acts 1846-1959. See Hopkins, "Family Provision on Death" (1971) 35 Conv. 72, 80.

67. ss.3 and 27(1); the Act implements the recommendations of the Law Commission <u>Report on Financial Provision in Matrimonial Proceedings</u>, Law Com. 25, paras. 23-32.

68. s.5(3); see below, para. 3.45.

69. See below, para. 3.45.

(iii) Position of adult or married children

3.39 The age limit of 21 on applications by a son differs from the age limit on orders for financial provision in divorce and other matrimonial proceedings. Under the Matrimonial Proceedings and Property Act 1970, section 8,[70] no order other than a settlement or variation of a settlement, may be made in favour of a child who has attained the age of eighteen. By way of exception, however, section 8(3) provides that the court may make an order or extend an order in favour of a child over that age if it appears to the court that:

> "(a) that child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or
>
> (b) there are special circumstances which justify the making of the order or provision."

If we are to retain an age limit for an application by a son for family provision we can see no reason why it should be different from that applicable in matrimonial proceedings.

3.40 At present there is no age limit for an application by an unmarried daughter. Considerations of equality suggest that there should be no difference between the rights of children of different sexes. All should have the same right to apply for family provision.

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70. See Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, paras. 37-39.

3.41 There are precedents in other jurisdictions for eliminating all age limits.[71] The absence of any age limit in England on claims by unmarried daughters is presumably because it was thought that an unmarried daughter was likely to be an actual dependant of a deceased parent. Although it may be more common for a parent to leave an adult daughter dependent on him than an adult son so dependent (excluding cases of incapacity)[72] it is not impossible for an adult son to be dependent on a parent. The argument against removing the age limit is that it might encourage able-bodied sons capable of supporting themselves to apply for a share of the estate, thereby possibly incurring costs to be paid from the estate and reducing the share of the surviving spouse or other beneficiaries. However, the chances of such a son (or, indeed, of a daughter in the same position) succeeding would be remote. There are no figures available, but reported cases do not suggest a great number of applications by unmarried daughters. One solution would be to limit the right to apply to those children, of any age, who were actually dependent on the deceased at the time of his death; but this would rule out a claim against the estate of a parent who had unreasonably refused to support an adult child during his lifetime. We consider that the better solution would be to remove all age limits, leaving the court to distinguish between the deserving and the undeserving.

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71. There is no age limit in the Republic of Ireland, Succession Act 1965, s.117, or in most of the Australian States or in New Zealand: Wright, Testator's Family Maintenance in Australia and New Zealand (2nd ed. 1966) pp. 120, 123 ff.

72. According to the National Council for the Single Woman and her Dependants there are over 250,000 single women who have given up employment or prospects to care for elderly parents or other relatives: The Problems of the Single Woman with Dependants (1970).

3.42 There remains the question whether there is any merit in the provision that a daughter may claim only if she has not married.[73] Although in principle the responsibility for maintaining her passes to the husband on marriage, in our view the restriction is capable of causing hardship, for example, in the case of a widow with young children who has not been provided for by her deceased husband.[74] To avoid possible hardship, we propose that the condition that a daughter can apply only if unmarried be removed. This proposal is unlikely to lead to any substantial increase in the number of cases since a married daughter whose husband is supporting her would not be likely to make or succeed in an application against the estate.

3.43 To summarise, we propose that any child of the deceased, whether over or under 21 and whether married or unmarried should be able to apply for family provision. If, contrary to our proposal, an age limit is retained we think that it should be 18 for both sons and daughters, as in the case of matrimonial proceedings; and that a child over 18 should be entitled to apply for family provision only in the circumstances specified in section 8(3)(a) and (b) of the Matrimonial Proceedings and Property Act, 1970, which are set out in paragraph 3.39 above.

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73. Or is incapacitated, see para. 3.35 above.

74. At present a daughter whose marriage has been annulled may claim: Re Rodwell [1970] Ch. 726. The comment has been made that: "It is hard to see any rational basis for a rule which excludes a daughter who has been left a penniless widow with several children to support, but which includes a childless daughter whose marriage has been annulled and who can claim financial provision from her former husband": Hall [1970] Cam. L.J. 213; see also Tyler, Family Provision (1971) p.20.

(b) Matters to be considered by the court

3.44 In determining whether the deceased has made reasonable provision for the maintenance of a child, the matters which the court at present has to consider are the same as those applicable in the case of a spouse.[75] We considered these criteria in relation to applications by spouses[76] and proposed certain changes to make them correspond, as far as possible, with the criteria applied by the court in applications for financial provision after a decree. In applications by children for family provision the criteria should, in our view, also correspond, as far as possible, with those laid down for children by the Matrimonial Proceedings and Property Act 1970.[77] Again, it must be taken into account that the circumstances are not necessarily the same, and that there are some matters which are relevant to only one type of application. With this in mind we propose that in family provision applications the court should have regard to

(a) The financial needs of the child;

(b) The income, earning capacity (if any), property and other financial resources;

(c) The obligations and responsibilities of the deceased towards the child and towards any other applicant for family provision or any beneficiary;

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75. Para. 3.16 above.

76. Paras. 3.17-3.20 above.

77. s.5(2) and (3), which is set out in the Appendix to this Paper. See para. 3.17 above in which we make a similar proposal in relation to applications by a surviving spouse.

(d) The size and nature of the estate;

(e) Any physical or mental disability of the child;

(f) If appropriate, the manner in which he was being or might expect to be educated or trained;

(g) Other circumstances.

Other circumstances might include, for example, any previous order made in respect of the child in any matrimonial proceedings, the financial position of the other parent, if living, and, in the case of an adult child, his conduct. Our views concerning the deceased's reasons[78] are equally applicable to applications by children.

3.45 When considering an application by a child who, although not the deceased's own child, has been treated by the deceased as a child of his family, the court should also have regard to the following matters, which are set out in the Matrimonial Proceedings and Property Act 1970, section 5(3):

(a) to whether the deceased had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the child was not his or her own;

78. Paras. 3.22-3.24 above.

(c) to the liability of any other person to maintain the child.

(c) Powers of the court

3.46 The court now has power to order provision for children by way of periodical payments or by a lump sum payment or by both means.[79] We think that the additional powers proposed above[80] to order a transfer or settlement of property in favour of a spouse should also be available in respect of children. The case for allowing the court to have these powers in family provision cases is as strong as in matrimonial proceedings. Since the court is dealing with a fixed body of assets, there may be even greater scope for the use of these powers in family provision cases.

4 APPLICATION BY OTHER DEPENDANTS

3.47 It may be that the class of applicants entitled to apply for family provision, at present limited to the spouse, former spouse and children of the deceased, should be extended. The Family Law Project of the Ontario Law Reform Commission have expressed the view that all actual dependants should have the right to apply:[81]

> "There may also have been other persons whom the deceased was supporting, and he may not have covered these commitments adequately in his will, he may have no will, or his will may be invalid. The court should have a discretion to continue against the estate of the deceased, on such terms as to amount and mode of payment as it may think reasonable, support obligations in existence at the date of death, whether legal or de facto."

79. 1938 Act, s.1(2) and (4).

80. Paras. 3.27-3.30.

81. Study on Property Subjects. Vol. III, Part IV, Conclusions Chapter 3, p.539 (rev.). See also Vol. III, Part III, Ch. 3, p.478 ff.

This question has also been considered by the Law Reform Committee of Western Australia.[82] Recognition of the fact that persons other than the surviving spouse and children may have been dependent on the deceased can be found in the Fatal Accidents Acts 1846-1959 under which a claim can be brought on behalf of a wide class of dependants of the deceased.[83] The problem of deciding which relationships should be recognised could be avoided by making the right to apply depend, so far as applicants other than a spouse or child are concerned, not on the applicant's relationship to the deceased but on whether the deceased had in fact been contributing to the support of the applicant. In other words, we think that consideration should be given to extending the right to apply for family provision to all persons who were in fact wholly or partially dependent on the deceased at the time of his death. There are many factors to be considered before such a change could be made. For example, it might be appropriate to attach special weight to the deceased's intentions. We should welcome views on whether the class of applicants should be extended and, if so, how a wider class of dependants should be defined.

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82. Working Paper on Testators' Family Maintenance (1968) paras. 66-67. They suggested the following formula: "any person who has been wholly or partly maintained by the deceased and for whose maintenance the deceased had some moral responsibility at the time of his death."

83. The class includes not only the spouse and children but also the parents, grandparents, grandchildren, brothers, sisters, uncles or aunts.

5 TIME AND MANNER OF APPLICATION

3.48 Under the 1938 Act, section 2(1) as amended by the Family Provision Act 1966, section 5:

> "an application ... shall not, without the permission of the court[84] be made after the end of the period of six months[85] from the date on which representation in regard to the estate of the deceased is first taken out."

Section 26(1) of the 1965 Act is in similar terms. The personal representatives are protected if, no application having been made, they distribute any part of the estate after the expiration of the six months' period, but this is without prejudice to any right to recover any part of the estate distributed.[86] We do not propose any amendment of these provisions. A time limit for applications has to balance the interests of the possible applicants for family provision against the need for certainty in administering the estate, and we think the present balance is fair.

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84. See Re Ruttie [1970] 1 W.L.R. 89 (extension of time allowed in "interests of justice").

85. In New Zealand the normal period for application is twelve months, but applications in respect of minors or persons under any incapacity can be made at any time within two years.

86. 1938 Act, s.1(1B); 1965 Act, s.28(1).

5.49 At present there is no provision for ensuring that all persons who might be possible applicants are notified of their right to apply, or of any pending claim by another dependant. The suggestions has been made, in relation to the legislation in Australia and New Zealand, that:

> "there should be legislative provision empowering an executor or adminstrator, or the Public Trustee, or the Registrar of Probates, if he considers that the case is a suitable one, to apply to the court for advice or directions as to whether he ought to make application under the Act for provision for any individuals whose rights appear to be affected."[87]

Such a provision would provide an extra protection for minor children, or dependants under an incapacity. A further possibility would be to provide, as in section 3(4) of the Tasmanian Act, that the court may direct that an application on behalf of one dependant be regarded as an application on behalf of all persons entitled to apply. Another suggestion is that once an application has been made by any dependant, the personal representatives should be under a duty to notify all other known dependants that if they wish to make an application for family provision they must apply at the same time. Provisions on these lines might help possible applicants and secure greater certainty in the administration of estates. We make no specific proposal but should welcome views as to the desirability of any of the above provisions.

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87. Wright, Testator's Family Maintenance in Australia and New Zealand (2nd ed. 1966) pp. 39-40.

6 INTERIM ORDERS

3.50 Under both the 1938 Act and the 1965 Act the court may order interim payments to be made to or for the benefit of any applicant if the applicant appears to be in immediate need of financial assistance and property can be made available.[88] The court in making an interim order must have regard, as far as possible, to all the circumstances to which it would have regard in making a final order, and the subsequent order may direct that the interim payments be treated as payments on account of that order. The power is an important one and is particularly valuable where, for example, a widow needs to pay rent or make mortgage repayments. We do not propose any change.

7 EFFECT OF ORDERS

3.51 Where an order is made, section 3(1) of the 1938 Act provides that the will or the intestacy law shall have effect as from the deceased's death subject to such variations as may be specified for the purposes of giving effect to the order.[89] If, for example, the order gives the surviving spouse an income for life payable from the estate, the order has the same effect as if it had been originally part of the will. This rule can have important estate duty effects. In the example given there would be an exemption from duty when the property charged with the survivor's life interest passed to the ultimate beneficiary, just as though the deceased had left the widow a life interest by will. This exemption can

88. These powers were introduced by the Family Provision Act 1966, s.6.

89. s.28(3) of the 1965 Act applies s.3 of the 1938 Act to applications under s.26 of the 1965 Act.

also be claimed when the surviving spouse's application is settled without a court order, provided the settlement is a bona fide compromise of the claim.[90]

3.52 Section 3(2) of the 1938 Act provides:[91]

> "The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order made under this Act, but no larger part of the net estate shall be set aside or appropriated to answer by the income thereof the provision for maintenance thereby made than such a part as, at the date of the order, is sufficient to produce by the income thereof the amount of the said provision."

There is no specific provision as to how the burden of any order made is to be shared between the beneficiaries.[92] In a recent case[93] Burgess V.-C. held:

> "The wording of the Act conferring the power to make an award and thus vary the provisions of the will in section 3(1) and (2) thereof is very wide - and, in my judgment, after consideration enables the court not only to apportion the burden of any award as regards respective classes of beneficiaries, but also, if in its discretion it thinks fit, to throw the burden unequally between beneficiaries in the same category or classes."

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90. Inland Revenue Notice, 2 March 1967.

91. This provision also applies to the 1965 Act (s.28(3)). For the binding effect of and enforcement of orders, see Re Knowles [1969] Ch. 386; Re Jennery [1967] Ch. 280 (C.A.); Re Lofts [1968] 1 W.L.R. 1949.

92. Under the New Zealand Family Protection Act 1955, s.7(1), the burden is to be spread rateably unless the court otherwise directs.

93. Re Preston [1969] 1 W.L.R. 317, 321; see also Re Westby [1946] W.N. 141; Re Simson [1950] Ch. 38.

If any doubt remains as to the extent of the court's powers, it should be removed in the proposed new legislation. The way in which an order is framed may be important in relation to powers of variation. We return to this below.

3.53 The usual practice is for the court to order that a certain part of the estate be set aside to meet the payments ordered in favour of a dependant. Under the New Zealand Act,[94] however, the court may order a beneficiary to make a periodical or lump sum payment directly to the dependant. Such a provision might be useful, as it would avoid the necessity of tying up part of the estate for an indefinite period. For example, in the case of shares in a private company or agricultural property it might be convenient to let the beneficiaries have the shares or the property vested in themselves immediately, subject to paying the dependant whatever sum was ordered. We therefore propose that a provision similar to that in New Zealand should be introduced.

8 VARIATION OF ORDERS

(a) Existing provisions

3.54 An order made under the 1938 Act may be varied by the court under section 4 (1) (a) "on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant[95] or of a person beneficially interested in the property". An application for an order under section 4 (1) (a) may be made by a dependant of the deceased, by the trustees of the property or by a person beneficially interested in the property. The court may also make an order under section 4(1)(b) "for making provision for the maintenance of another dependant of the deceased,"

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94. s.7(3).

95. i.e. a person entitled to apply under s.1 of the 1938 Act.

after the time limit for original applications has expired.

3.55 An order under section 4(1) may be made "only as respects property the income of which is at that date applicable for the maintenance of a dependant of the deceased". Although under section 1(1) a "dependant" is a person entitled to apply for family provision, it has been held that no application can be made under section 4 unless there is already a dependant in receipt of provision under the Act.[96] It would seem to follow that a variation order can affect only property the income of which is applicable for the maintenance of a dependant under an earlier family provision order.[97] The effect is that the court can rarely vary an order so as to increase the total amount of maintenance payable to dependants, though it may decrease it, and it may, where there is more than one dependant, vary the amounts payable to the various dependants. The court may make provision for a dependant who was not previously receiving anything by reducing the amount payable to another dependant.

3.56 Section 27 of the 1965 Act contains provision for the variation of an order made in favour of a former spouse under section 26. The persons who may apply for a variation include the original applicant, any other former spouse of the deceased, any dependant of the deceased, the trustees and the beneficiaries under the will or intestacy. An order under section 27 can affect only property "the income of

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96. Re Dorgan [1948] Ch. 366.

97. Under section 27 (3) and (5) of the 1965 Act this matter is beyond doubt since the court can have recourse to property "the income of which, in accordance with the original order ... is applicable ... for the maintenance of the former spouse..." See Tyler, Family Provision, pp. 34-36.

which in accordance with the original order ..... is applicable wholly or in part for the maintenance of the former spouse on whose application the original order was made". As in the case of the 1938 Act, there is thus considerable certainty for the beneficiaries after six months. Under section 27 (4) the court in exercising its powers:

> "shall have regard to all the circumstances of the case, including any change in the circumstances to which the court was required to have regard in determining the application for the original order."

This formula has been adopted by the Matrimonial Proceedings and Property Act 1970, section 9(7), in relation to the variation of orders for financial provision in matrimonial proceedings. In our view it is more appropriate than the somewhat restrictive wording of section 4(1) (a) of the 1938 Act and we propose that it be used in new family provision legislation.

(b) Should existing powers of variation be curtailed or widened?

3.57 If the court finds that the deceased failed to make reasonable provision for the maintenance of an applicant for family provision and makes an order for a lump sum payment (or, under the new powers we have proposed, for the transfer or settlement of property) it is, in effect, replacing the deceased's will with a will which it considers reasonable in the light of the circumstances existing at the date of the hearing.[98] An order for periodical payments to be made from the estate to a dependant is more akin to a maintenance order in matrimonial proceedings; such an order gives rise to a continuing obligation and, under present law, can be varied within limits on a change of circumstances. There is a case

98. Para. 3.15 above.

for saying that once the court has decided what is reasonable this should conclude the matter, and that all orders for family provision should be final. In support of this argument it can be said that if the court had found that the will was reasonable, and made no order, it would not be possible for the applicant to re-apply if his circumstances changed perhaps years later. An advantage of eliminating all power to vary orders for family provision would be the greater certainty in the administration of estates, which might benefit all parties.

3.58 So far as concerns orders for lump sums and transfers of property, the arguments against later review of such orders were set out in our Report on Financial Provision in Matrimonial Proceedings.[99] It would be impracticable to re-open matters after the estate had been distributed and the property or lump sum disposed of. If such orders could not be varied, the court would take that into account in deciding whether to order a lump sum or a transfer of property. Similar considerations apply to settlements of property. In our view, orders for lump sum payments or for transfers or settlements of property should be final and not subject to later variation.

3.59 On the other hand, different considerations apply to orders for periodical payments to be made from the estate to a dependant. No property interest is transferred to the dependant under such an order, but the estate is charged with a continuing obligation to contribute to the maintenance of that dependant. It could be argued that once the circumstanc

99. Law Com. No.25, paras. 87-90.

which gave rise to that obligation have changed, e.g. by the dependant acquiring or losing another source of income,[100] the obligation itself should be varied downwards or upwards. On balance it is our view that it is necessary to retain a power to vary orders for periodical payments from the estate to meet these two situations, and therefore we do not propose any restriction on the present powers.

3.60 If it is accepted that a power to vary orders for periodical payments is needed there are two further questions to consider: the property which can be affected by a variation order, and the persons who may apply for a variation. Dealing first with the property which may be affected by a variation, at present the court can deal only with property set aside under the original order for the maintenance of a dependant.[101] The effect is that, since the estate will often have been distributed except for any property retained or set aside to meet the order, it is seldom possible to vary an order upwards. The persons most likely to benefit from a variation under present law are not the dependants of the deceased, but the beneficiaries. It could be argued that this is too great a restriction on the court's powers to deal fairly with an application to vary.

3.61 Bearing in mind that no recourse can be had to property which has already been distributed, such as an absolute bequest or a lump sum paid to a successful applicant under the original order, it seems that there are three

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100. If our proposal that orders should not end automatically on remarriage were implemented, a power to vary might be thought necessary (para. 3.32 above).

101. Re Dorgan [1948] Ch. 366.

possible funds which might be affected by a variation order:

(a) Property which was set aside under the original order to provide income for the maintenance of a dependant who made a successful application for family provision.

(b) Property the income of which is being applied either in accordance with the original order or under the will or intestacy of the deceased for the maintenance of any dependant of the deceased (i.e. a person who would have been entitled to apply for family provision, whether or not an application was made).

(c) All property the income of which is being applied for the maintenance of any dependant or beneficiary of the deceased.

3.62 Category (a) (which is apparently the present law) ensures certainty for the beneficiaries; provided the period for original applications has elapsed, only property set aside under the original order can be affected. Though there is much to be said in favour of certainty, the effect is that it is almost impossible for a dependant to get increased provision from the estate except at the expense of another dependant in receipt of maintenance under an order. It could be argued that it is neither fair nor practicable to distinguish between property left by the will or intestacy to a dependant and property set aside for a dependant by order of the court and that the court should be able to have recourse to category (b).

3.63 The effect of extending the court's powers to category (b) might, however, lead to further anomalies. Suppose, for example, that a man left a life interest in a fund of £12,000 to be shared equally between his wife and his sister. On the successful application by his two daughters for family provision a fund of £6,000 was set aside for them equally, the widow and sister being left with equal interests in the remainder. Under present law daughter A could succeed on an application to increase her provision only if the amount payable to daughter B was reduced. If category (b) were adopted the court could also have recourse to the widow's life interest (she being a "dependant" of the deceased). But it may seem unfair that the widow's interest could be reduced, just because she was a "dependant", whereas the interest of the sister (or of any other beneficiary who was not a "dependant") could not be affected. For this reason, it seems to us that if it is thought that the present narrow category of property should be extended in the interest of dependants, it may be easier to justify the widest category (c) than category (b). It would be consistent with the view that an order for periodical payments imposes a continuing obligation on the estate towards the dependant, to allow the court to have recourse to all the property remaining in the estate whether for the benefit of dependants or of beneficiaries. This is, however, a matter which we leave open; we would welcome views on whether the present powers should be extended and, if so, what property should be subject to the variation power.

3.64 Under present law the persons entitled to apply for a variation include the trustees of the property and any person beneficially interested in the property under the will or intestacy. In case there is any doubt it should be made clear that this means the will or intestacy as it stood before any order for family provision was made.[102] Others entitled to apply include not only the original successful applicant but also other dependants of the deceased, even if they were not original applicants.[103] However, if a provision such as that considered earlier were adopted,[104] virtually all dependants would have been before the court, or would have had the opportunity of applying to the court on the original application. This being so, it should be considered whether an unsuccessful applicant should be entitled to apply for a variation in his favour. It could be argued that once the court has decided that the provision made by the deceased for that particular dependant was reasonable (or that it was reasonable to have made no provision for that dependant) there should be no further enquiry into the matter. However, this view would lead to the result that dependant A whose application was successful, and who was in receipt of a small periodical payment, could apply for an increase if his circumstances changed for the worse, whereas dependant B, whose application failed because he was reasonably well off at the time, could not ask the court to reconsider his position even if he became destitute. If it is accepted that the estate has a continuing obligation towards certain

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102. So that any beneficiary whose interest was extinguished by the original order would not be excluded from applying. See 1938 Act, s.3(1).

103. Paras. 3.54-3.56 above.

104. Para. 3.49.

dependants (i.e. those in whose favour an order for periodical payments has been made) and that the extent of the obligation should be measured not solely by what would have been reasonable at the time of the original application, but in accordance with any change in circumstances thereafter, it could be argued that the court should have power to consider the claim of any dependant whose circumstances changed after the original hearing. It could be argued further that it would be illogical to limit the right of a dependant to apply on a change of circumstances to cases where an original order had been made in favour of another dependant. In other words, it could be said that any dependant should have the right to apply at any time if his circumstances had changed since the date of the deceased's death or the original hearing.[105] Obviously, the value of the right to apply on a change of circumstances would be limited by the amount of property available in the estate to meet any order. Often there would be none.

3.65 The proposal that any dependant should have the right to apply at any time after the deceased's death would involve considerable extension of the present family provision law. We make no firm proposals on these questions but we should welcome views on whether the class of dependants entitled to apply for a variation on a change of circumstances should include unsuccessful original applicants, and on whether the right to apply or to re-apply for family provision on a change of circumstances should be extended to cases where no order had been made on the original application.

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105. This would be a right independent of the right to apply, with leave, out of time under s.2(1) of the 1938 Act or s.26(1) of the 1965 Act: see para. 3.48 above.

3.66 A wife cannot, by entering into a separation or maintenance agreement, debar herself from applying to the court or oust the jurisdiction of the court to award financial provision in matrimonial proceedings.[106] It has been said that "the wife's right to future maintenance is a matter of public concern, which she cannot barter away." The same rule applies to a former spouse's right to apply for family provision under the 1965 Act: it cannot be barred by agreement.[107]

3.67 On the other hand, a spouse's right to financial provision in matrimonial proceedings can be barred effectively if the agreement between the spouses is sanctioned by the court. For example, the husband may offer to pay a certain sum to the wife if she agrees to her application for financial provision being dismissed; if the court approves this agreement and dismisses the application, the wife cannot thereafter re-apply during joint lives for financial provision.[108] Since an application for family provision cannot be made until the death of the other party this method cannot be used to bar the survivor's application. In Re M.[109] it was held that although a former wife had undertaken to make no further claim for maintenance against her husband or his estate, and had agreed to the discharge of her maintenance order by consent, the court's jurisdiction to make an order for provision from the estate was not ousted.

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106. Hyman v. Hyman [1929] A.C. 601 (H.L.); see also Wright v. Wright [1970] 1 W.L.R. 1219 (C.A.).

107. Re. M. [1968] P.174.

108. L. v. L.[1962] P.101, 119.

109. [1968] P.174; see also Re S.[1965] P.165.

3.68 If parties to divorce or other matrimonial proceedings can enter into an agreement which, if sanctioned by the court, will effectively bar any claim to maintenance by one spouse while the other lives, it seems illogical that their agreement cannot also bar the right to apply for family provision. The possibility of excluding such applications might well be an added inducement to a husband to make a final and binding maintenance agreement with his former wife. On the other hand, we do not think it desirable for agreements to be made during the subsistence of a marriage to bar claims by a surviving spouse under the 1938 Act. Nor do we consider that an agreement should debar an application under the 1965 Act unless it has been sanctioned by the court; an unsanctioned agreement might, of course, influence the court in deciding whether, and in what terms, to make an order. However, we propose that parties to matrimonial proceedings for divorce or nullity should be allowed to make agreements as to financial provision which, if sanctioned by the court, could bind the parties even after the death of one of them and bar claims for family provision under the 1965 Act. Children would not be affected.

10 AVOIDANCE OF DISPOSITIONS

3.69 Legislation which allows the dependants of a deceased person to apply for maintenance will be effective only to the extent that there is an estate. If the deceased has disposed effectively of his property during his lifetime, family provision legislation will not be able to operate.[110]

110. See Albery, The Inheritance (Family Provision)Act, 1938 (1950) "Appendix D: Settlement upon Mistress and Illegitimate Child for Purpose of Evading the provisions of the[1938] Act", pp. 67-68; see also p.17 as to alternative methods of evasion. See also Macdonald, Fraud on the Widow's Share (Ann Arbor, 1960) in which family provision legislation combined with anti-evasion provisions is advocated for America to overcome the evasion by inter vivos dispositions of widows' legal rights.

In general, people do not try to evade their obligations to their nearest and dearest, but there will always be some who will seek to put their property beyond the reach of certain members of their family who may have a just claim for family provision.[111] It may be argued that any provision designed to avoid dispositions made with this intention would involve too great an interference with the freedom of an individual to dispose of his property as he pleases, that uncertainty would be introduced into inter vivos transactions and that it would be difficult in the case of a deceased person to produce evidence of an intention to defeat the claims of family members. In our view, however, the overriding consideration is to ensure that family provision laws are effective.[112] The introduction of measures designed to prevent a person disposing of his property so as to defeat claims for family provision would not only give the court power to intervene in the interests of dependants but would also discourage a testator from acting against those interest

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111. In Re Carter (1968) 112 Sol. J. 136, the deceased had made a large inter vivos gift before his death to one of the beneficiaries of the will. Buckley J. took this into account in ordering the whole estate to go to the widow. The court would have been unable to act if the deceased had disposed of the whole of his property inter vivos.

112. For avoidance provisions in other jurisdictions, see the Republic of Ireland Succession Act 1965, s.121, and the Proceedings of the 49th Conference of Commissioners on Uniformity of Legislation in Canada 1967, pp.219-221. It has been said of the Australian and New Zealand Family Provision Acts that they can be successfully evaded by the expedient of transferring property inter vivos: Wright, Testator's Family Maintenance in Australia and New Zealand (2nd ed. 1966) p.IX.

3.70 The case for such a provision is strengthened by the fact that the court has power under the Matrimonial Proceedings and Property Act 1970, section 16,[113] to avoid transactions made with the intention of defeating a claim for financial provision in matrimonial proceedings. It is difficult to see why a person should be allowed to defeat a claim for family provision on his death but not a claim for financial provision on the breakdown of his marriage. It may be that he is more likely to want to deafeat the latter but that is hardly an adequate justification for the distinction. Under section 16, the court may set aside a transaction in matrimonial proceedings if it is satisfied:

(i) that the transaction was made with the intention of defeating the claim for financial provision, and

(ii) that if the transaction were set aside financial provision or different financial provision would be granted to the applicant.

An intention to defeat the applicant's claim is presumed unless the contrary is shown, if the transaction took place less than three years before the application and the disposition has had the effect of "preventing financial provision from being granted to the applicant, ... or reducing the amount of any financial provision which might be so granted". The provision does not apply to a disposition made for valuable consideration to a bona fide purchaser without notice of the intention of the other party to defeat a claim for financial provision. There is no time limit on the transactions which can be investigated, but the presumption only applies in respect of dispositions

113. These powers were first introduced by the Matrimonial Causes (Property and Maintenance) Act 1958, ss.2, 5.

made within three years. We propose that a court hearing an application for family provision should be given powers similar to those conferred by section 16 of the Matrimonial Proceedings and Property Act 1970 on a court hearing an application for financial provision.

3.71 We propose further that the powers granted to the court should be wide enough to enable the court to deal with the following categories of property:

(a) Property disposed of or settled outright by the deceased.

(b) Benefits payable on the deceased's death under insurance policies provided by the deceased.[114]

(c) Property in respect of which the deceased held a general power of appointment, or a special power of appointment exercisable in favour of an applicant for family provision, and property which would go to the applicant in default of exercise of a power of appointment by the deceased. In effect, the exercise of the power, or the failure to exercise the power, should be equally regarded as a "disposition".

A more difficult category of property is that comprising benefits payable from a pension fund provided as a result of the deceased's employment. On the death of the employee, a pension may be payable to a surviving dependant. Although

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114. For the suggestion that insurance benefits payable directly to a beneficiary should be treated as part of the net estate, see Tyler, Family Provision (1971) pp.23-24.

the trustees generally have an absolute discretion, they frequently pay the benefits to the person nominated by the deceased. The pension may be the only "asset" of any value, and it may cause hardship to a dependant if the deceased chose unreasonably. We therefore invite views as to whether the court should be given power to substitute its own discretion for that of the trustees.

3.72 A presumption as to the intentions of the deceased would place the burden of proof on the original donee or transferee of the property and it might be difficult to discharge the burden when the donor was dead. On the other hand, if there were no presumption, the applicant would have to prove the intention of the deceased to defeat the application which would be equally difficult. On balance we think the same presumption should apply as in matrimonial proceedings.

3.73 The parties to an application to set aside a transaction would be the applicants for family provision, the personal representatives, and the donee or transferee of the property in question. Applications to set aside transactions should be subject to the same time limit as that which applies to original applications for family provision, i.e. six months from the date on which representation is first taken out.

3.74 Once the court has decided that a particular transaction was intended to defeat and had the effect of defeating a dependant's claim to family provision, it should have the same powers as in matrimonial proceedings, i.e. to

> "make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property)."[115]

The court would not necessarity require the donee or transferee to surrender the whole of any property received from the deceased. The court would consider the disposition together with the dispositions made under the will or intestacy and would remain free to exercise its discretion as to which beneficiaries, transferees or donees should bear the burden of the award of family provision, and in what proportions.

3.75 It is not at present possible to set aside a transaction on the ground that it was designed to defeat a claim to vary a maintenance agreement or an order for secured provision after the death of the party chargeable.[116] We drew attention to this in our Report on Financial Provision in Matrimonial Proceedings and said that "it would be anomalous to introduce such a power until it can be extended equally to claims under the Inheritance (Family Provision) Act 1938 and section 26 of the Matrimonial Causes Act 1965. Any such extension must await a full review of Family Proper

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115. Matrimonial Proceedings and Property Act 1970, s.16(1)(b).

116. S.16(1) operates only where proceedings are brought against the person who made the disposition that is in question.

Law."[117] Now that it is proposed to give the court power to set aside transactions in family provision proceedings, there is no obstacle to applying the same rule to proceedings to vary financial provision or maintenance agreements after the death of a spouse.

11 SUMMARY OF PROPOSALS

(a) General

3.76 In this part of the Paper we have made a number of proposals for the extension of family provision law. Ideally, all existing enactments concerning family provision should be replaced by a new Act, and the jurisdiction exercised in one division of the High Court. Although we have left the matter open for discussion and comment it is our tentative view that family provision law should remain confined to its present function of securing reasonable provision for the surviving dependants, and that it should not be used to enable a surviving spouse who has no maintenance need to acquire a share of the family assets. If, as we suggest, family provision law is confined to the provision of reasonable maintenance for persons classed as dependants of the deceased, it can perfectly well co-exist with a succession law which recognises that certain persons, for example, a wife, have fixed proprietary rights in the estate of a deceased which override any will he may have made. Furthermore, neither a community system nor a law which recognises co-ownership of the matrimonial home would replace the need for family provision law. Thus, family provision law may be seen ultimately as one which confers upon the court a discretionary power to award maintenance to dependants on the

117. Law Com. No.25, para. 97.

death of the bread-winner: it should be designed as a supplement to, but not a substitute for, a reformed family property law.

3.77 Protection of the use and enjoyment of the household goods, and occupation of the home would become part of family provision law if the proposals in Parts 1 and 2 of the Paper were implemented. In the following Parts we discuss two systems under which a spouse would be given fixed property rights on the termination of the marriage by death: legal rights of inheritance, and community of property

(b) Specific

3.78 (i) Jurisdiction under the Inheritance (Family Provision) Act 1938 should be transferred to the Family Division of the High Court (this should not, however, affect the jurisdiction of the county court) (para.3.5).

(ii) Family provision legislation should not be used as a means of enabling a spouse to acquire a share of the family assets (paras. 3.6-3.9).

(iii) It should be made clear that in deciding whether to make an order for family provision the test should be whether the provision in fact made by the deceased for the applicant is reasonable, and that the court may take into account any change in circumstances which has arisen since the date of death (para. 3.15).

(iv) In deciding whether to make an order in respect of a spouse or former spouse and if so in what form the court should have regard to criteria (a) to (k) set out in paras. 3.17-3.21 .

(v) Any statement of reasons made by the deceased should continue to be admissible, where relevant, in accordance with the Civil Evidence Act 1968, and section 1(7) of the 1938 Act should be repealed (para. 3.24).

(vi) The court should have power to order a transfer or settlement of any part of the estate, and in particular the matrimonial home, to or for the benefit of

(a) the surviving spouse (para.3.28),

(b) any surviving child of the family of the deceased (para.3.46);

and views are invited on whether these powers should also apply in relation to a former spouse (para.3.31).

(vii) The court should have power to authorise the purchase of property for the benefit of the surviving spouse (para.3.29).

(viii) Views are invited on whether the court should have power to vary ante- or post-nuptial settlements (para.3.30).

(ix) An order for periodicial payments for a surviving spouse should not automatically cease to have effect on remarriage (para. 3.32).

(x) Any child treated by the deceased as a child of his family should be entitled to apply for maintenance as a dependant under the 1938 Act (para.3.38).

(xi) Any child of the deceased should be entitled to make an application under the 1938 Act, whether over or under 21 and whether married or unmarried (para.3.43).

(xii) In deciding whether to make an order in favour of a child of the family of the deceased the court should have regard to criteria (a) to (g) set out in para. 3.44.

(xiii) Views are invited on whether the right to apply for family provision should be extended to a wider class of dependants and, if so, how that class should be defined (para.3.47).

(xiv) Views are invited on whether any provision should be introduced for notifying possible claimants of their right to apply, or of pending applications, or for ensuring that all possible claimants are before the court (para.3.49).

(xv) The court should have power to order lump sum or periodical payments to be made by a beneficiary directly to a dependant (para. 3.53).

(xvi) In exercising its powers to vary an order the court should have regard to all the circumstances, including any change in the circumstances to which it had regard in making that order (para.3.56).

(xvii) The power to vary orders should apply only to periodical payments (paras.3.58 and 3.59).

(xviii) Views are invited as to whether, on an application to vary an order for family provision, the court should be able to have recourse to property other than property set aside in accordance with its original order (para.3.63).

(xix) It should be made clear that the persons entitled to apply for a variation include any person beneficially interested in the estate under the will or intestacy rules before any order for family provision was made (para.3.64).

(xx) Views are invited as to whether the class of dependants entitled to apply for a variation on a change of circumstances should include an unsuccessful original applicant, and on whether a dependant's right to apply or to re-apply for family provision on a change of circumstances should be extended to cases where no order had been made on the original application (para.3.65).

(xxi) Parties to matrimonial proceedings should be allowed to make agreements as to financial provision which, if sanctioned by the court, could bar any claim to family provision (para. 3.68).

(xxii) The court should have the same power as in matrimonial proceedings to set aside transactions made with the intention of defeating a claim for family provision (para.3.70) or for the variation of a maintenance agreement or an order for secured provision (para.3.75).

(xxiii) The powers proposed above should extend to the categories of property set out in para. 3.71. Views are invited as to whether the court should be given power to substitute its own discretion for that of the trustees of a pension fund from which benefits are payable on the death of the deceased. (para. 3.71)

(xxiv) As regards transactions which took place less than three years before the death of the deceased, if they have had the effect of preventing financial provision from being granted or reducing the amount of any order for family provision, there should be a rebuttable presumption that they were made with that intention (para.3.72).

PART 4

LEGAL RIGHTS OF INHERITANCE

1 INTRODUCTION

4.1 It has been stressed in the Paper that during a stable marriage it is seldom of importance to the spouses to establish their precise property rights. These rights become important at two stages: when the marriage breaks down, and when it ends with the death of a spouse. In Part 3 the law of family provision was examined to see whether improved protection could be given to the spouse, former spouse or child of a deceased.

4.2 Another way of providing for surviving members of the family, where the deceased intentionally or accidentally failed to provide for them, would be to give them a legal right to inherit a fixed portion of the estate. Such a legal right of inheritance must be distinguished from the right to apply for family provision, which depends on discretionary factors.[1] It would also differ from succession rights on intestacy, which operate only where there is no will or where the will does not dispose of all the deceased's estate. A legal right of inheritance would operate irrespective of the provisions of the will.

4.3 Legal rights of inheritance were known to Roman law, and were also recognised in early English law.[2]

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1. See Guest, "Family Provision and the Legitima Portio" (1957) 73 L.Q.R. 74, for a comparison of legal rights and family provision.

2. Plucknett, A Concise History of the Common Law (5th ed. 1956) "The Family Reserve", p. 743 ff.; Pollock and Maitland, History of English Law, Vol. II, p. 348.

Although legal rights to succeed to the deceased's personalty were largely abolished in England by the 17th century, the widow's right to dower (i.e. to a life estate in one third of her husband's real property) and the widower's corresponding right to curtesy were not finally abolished until 1925.[3] Legal rights of inheritance still apply in Scotland[4] and in many other modern legal systems, including both those where community of property applies,[5] and those where it does not.[6] We use the term "legal rights of inheritance": but in some countries the equivalent right is referred to as "legitim", "compulsory portion", "fixed portion", "forced share", "reserve" or "elective right".

4.4 In preparing this Paper we have studied several systems of law under which the surviving spouse and children are given legal rights of inheritance, and have been assisted by the recent study of this subject in the United

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3. Administration of Estates Act 1925, s. 45.

4. See below, para. 4.5

5. E.g., DENMARK: Pedersen, "Matrimonial Property in Denmark" (1965) 28 M.L.R. 137, 148; GERMANY: Cohn, Manual of German Law, Vol. 1 (2nd ed. 1968) ss. 518, 582, 633 ff.; M. Hanotiau "Le conjoint survivant en droit allemand", in Le Statut civil du conjoint survivant, Bibliothèque de la Faculté de Droit de l'Universite Catholique de Louvain No. VII (1970) p. 369.

6. E.g., SCOTLAND: see below, para. 4.5; REPUBLIC OF IRELAND: Succession Act 1965, Part IX, s. 109 ff.; Gerard Clarke, "Some Aspects of the Succession Act, 1965; Caveant Executores; New Powers and Burdens for Personal Representatives" (1966) 1 Irish Jurist 222; UNITED STATES: for problems concerning legal rights of inheritance in those common law states which have them, see Macdonald, Fraud on the Widow's Share (1960); ITALY: The Italian Civil Code (transl. by M. Beltramo, etc. 1969) Chapter X: Forced Heirs, ss. 536-552.

States,[7] where legal rights for the surviving spouse are common. It is impracticable to describe here all these systems, but we give one example, that of Scotland, to show how legal rights operate in practice.

4.5 Under Scots law[8] both the surviving spouse and children may claim legal rights.[9] Legal rights affect only the moveable estate, and no longer apply to heritage (immoveables). On intestacy, they apply only to that part of the estate left after the surviving spouse's rights have been satisfied.[10] A spouse's legal rights are to one-third of the moveable estate or, if there is no issue, to one-half. The children's[11] legal rights are to one-third of the moveable estate or, if there is no surviving spouse, to one-half. The balance, which may be disposed of by

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7. Uniform Probate Code (approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August 1969) Article II, part 2: "Elective Share of Surviving Spouse". The Uniform Code strengthens the right of the surviving spouse to an elective share by allowing certain transfers in "fraud" of the share to be taken into account. At the same time it provides that the survivor must give credit for benefits received from the deceased during joint lives.

8. Gloag and Henderson's Introduction to the Law of Scotland (7th ed. 1968) by A.M. Johnston, Q.C. and J.A.D. Hope, p. 570 ff.; David M. Walker, Principles of Scottish Private Law Vol. II (1970) p. 1794 ff.; M.C. Meston, The Succession Scotland Act 1964 (2nd ed. 1969) p. 41 ff.

9. Legal rights include the widow's rights (jus relictae) the widower's rights (jus relicti) and the children's rights (legitim).

10. Where the intestate estate includes an interest in a dwelling house, the surviving spouse is entitled to receive: (1) that interest or the value thereof if the value does not exceed £15,000 or, if it does, a sum of £15,000; (2) the contents of the house (i.e. furniture and plenishings) up to the value of £5,000; and (3) a legacy of £2,500 if the intestate is survived by issue (i.e. descendants) whether legitimate or not, or £5,000 if he is not survived by issue: Succession (Scotland) Act 1964, ss. 8, 9 and 10. See Walker, op. cit. p. 1762 ff.; Meston, op. cit. p. 27.

11. Including illegitimate children: Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, ss. 2, 3 and 22(5) and Sch. 1, paras. 3, 4, 5 and 7, and the issue of a child who predeceased the deceased: Succession (Scotland) Act 1964, s. 11(1).

will, is called the "dead's part". The following brief summary shows how Scots law deals with some of the problems considered below:

(a) Renunciation and discharge. A spouse may renounce or discharge legal rights expressly (for example, in an ante-nuptial contract), or by clear implication (for example, acceptance by a spouse of a life interest will exclude any claim to legal rights in respect of the property burdened by the life interest).[12]

(b) Benefits received from the estate. It is implied, in the absence of an express declaration to the contrary, that a legacy to a spouse or child is in full satisfaction of legal rights; an election must be made between the legacy and legal rights if there is a testamentary provision in favour of the elector.[13]

(c) Dispositions in favour of third parties, and avoidance of legal rights. During the testator's lifetime he may minimise legal rights by converting his property into heritage, or by alienating it, even if he does so gratuitously. He may also evade legal rights by a transfer of property under reservation of a life interest therein, even if this is

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12. Gloag and Henderson, op. cit. p. 577; Meston, op. cit., p. 52 children and remoter issue may also discharge legal rights, but a parent cannot exclude the child's right to claim legitim unless the child elects to accept the provision made for him: Succession (Scotland) Act 1964, s. 12.

13. Succession (Scotland) Act 1964, s. 13. This does not necessarily preclude a claim to legal rights in any estate falling into intestacy: Meston, p. 51.

done expressly to defeat legal rights. However, if he retains any power of disposition over the property disposed of or the reversion the transfer will not effectively preclude legal rights.[14]

4.6 In those countries where legal rights of inheritance apply, they are combined in various ways with the rules of intestate succession, with the right to claim maintenance from the estate of the deceased, and with the survivor's share on the division of community property. The survivor's legal rights are sometimes expressed as a fraction of the rights on intestacy: for example, in Germany a spouse's legal rights are one-half of the amount due on intestacy. Whether or not this is the case, the amount which a spouse would receive under legal rights is invariably less than he would have received on intestacy. For this reason, legal rights are seldom of relevance in the case of complete intestacy.

4.7 It is not usual for legal rights and the right to apply for maintenance to be combined. In countries with systems of separate property, a surviving spouse sometimes has a right to apply for maintenance from the estate[15] and sometimes a fixed legal right of inheritance.[16] In countries with systems of community of property, the survivor is entitled to his or her share of the community property on the death of the other spouse. This is not an inheritance right, since the community must be shared

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14. Gloag and Henderson, pp. 570-571.

15. E.g. England, Australia, New Zealand, Ontario.

16. E.g. Scotland, Republic of Ireland (the children, on the other hand, have the right to claim proper provision from the estate, but not legal rights), Italy.

whether the marriage ends in death or by divorce; it may, in fact, involve the survivor paying the deceased's share of the community into the estate. Once the community property has been shared, the surviving spouse may have a right to inherit part of the deceased's estate (i.e. the deceased's share of the community and any separate property)[17] or to maintenance from the estate.[18]

4.8 In some countries only the surviving spouse has legal rights;[19] in others only the children (or other heirs);[20] in yet others, both the spouse and the children (or other heirs).[21] Legal rights are often expressed as a fraction of the estate of the deceased and the fraction may vary according to the number and class of those entitled. Sometimes there is a right to a minimum amount.[22]

2 THE CASE FOR A SYSTEM OF LEGAL RIGHTS: ITS PLACE IN FAMILY PROPERTY LAW

4.9 Before considering how a system of legal rights would operate, we examine briefly its relationship to the other aspects of family property law law dealt with in the Paper and its relative advantages and disavantages. One aim of the reforms here considered is to give greater

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17. E.g. Germany, Denmark.

18. E.g. France, Belgium. On the relationship between legal rights and maintenance, see Le Statut civil du conjoint survivant, "Droit Neerlandais", p. 348 ff., and "Conclusions" p. 546 ff.

19. E.g. Republic of Ireland.

20. France.

21. E.g. Germany, Scotland, Italy.

22. Denmark, Sweden.

protection to the economically weaker spouse.[23] We have already suggested two basic ways of achieving this aim:

(i) by strengthening a spouse's right to be supported by the other spouse (i.e. by improved family provision, and by protection of occupation rights and the use and enjoyment of the household goods);

(ii) by changing the laws relating to ownership of property, to ensure that a spouse who has been unable to make a financial contribution will nevertheless have an interest in certain family assets (i.e. co-ownership of the matrimonial home).

As was pointed out in the General Introduction[24] support rights and property rights are complementary, since a spouse with property rights in the family assets will have less need to rely on support rights, and a spouse who successfully enforces support rights may obtain either the ownership or the use of some of the other spouse's property. What would be the relationship between legal rights of inheritance and the other proposals considered?

4.10 We start by comparing legal rights with family provision law as a means of providing support for the surviving spouse. The chief difference is that legal rights would ensure for the survivor a fixed proportion of the estate whereas under family provision law the survivor must apply to the court, prove that the deceased failed to make reasonable provision for the survivor, and then rely on the exercise of the court's discretion. The certainty of legal

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23. The term "economically weaker spouse" means the spouse who, because he or she has no earnings or other means, has been unable to make a financial contribution to the acquisition of the family assets or to acquire any assets.

24. Para. 0.20 above.

rights could be seen as its greatest advantage over family provision. On the other hand, because legal rights are fixed, they may give the survivor more or less than is needed for support: they take no account of the means or needs of the survivor or of the special circumstances of each case.[25] It is very difficult to work out a formula fo calculating legal rights which would apply fairly to both large and small estates.

4.11 This raises the question whether, if legal rights were introduced for a surviving spouse, it should be considered as a substitute for family provision law or as a supplement to that law.[26] In the former case legal rights would establish both the minimum and the maximum sum which a surviving spouse could claim; in the latter case they would fix only the minimum sum. The details of a system of legal rights would depend to a large extent on whether it was in addition to or in substitution for family provision. For example, the amount of legal rights migh be smaller if the surviving spouse could claim family provision; on the other hand if there were no right to apply for family provision, a system of legal rights would almost certainly have to incorporate anti-avoidance provisions, similar to those we have proposed for family provision, to prevent a spouse from nullifying the other spouse's rights by inter vivos dispositions. It would be premature to decide the relationship between family provision and legal rights

25. As to the possibility of barring or varying legal rights on the ground that the survivor has not performed his or her matrimonial obligations, see para. 4.58 ff. below.

26. As we do not propose legal rights for children (see para. 4.16 below) their right to apply for family provision would not be affected.

until we have considered the latter in some detail. It should be remembered, however, that whereas the advantage of certainty would be partly lost if family provision were retained, in the case of small estates (which constitute the majority) some surviving spouses might do less well if legal rights were substituted for the right to apply for family provision.

4.12 Next, legal rights of inheritance could be considered as a rough and ready means of ensuring that on the termination of the marriage by death, the survivor would receive a share of such family assets[27] as were owned by the deceased. It would be an imprecise method of achieving this end, because a system of legal rights could not easily be restricted to that part of the estate consisting of family assets,[28] but would give usually give the survivor a share of the whole estate. In comparison with the other systems of fixed rights considered in the Paper the following points can be made:

(a) The proposals concerning co-ownership of the matrimonial home were based on the view that the home is the principal family asset. If those proposals were introduced, it could be argued that legal rights of inheritance would be unnecessary, assuming that the home was owned, as the survivor would already have an interest in the major family asset. If, nevertheless, legal rights were introduced in addition to co-ownership, it would be necessary to consider

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27. See General Introduction, para. 0.24 above, for the meaning of "family assets."

28. See para. 4.26 below.

whether they should be reduced, or even excluded, where the survivor had already received an interest in the home under the co-ownership principle. Ways of avoiding possible accumulation of rights will be considered below.[29]

(b) In Part 5 we consider a system of community of property, under which on termination of marriage by divorce or death there would be a sharing of those assets acquired by the spouses during the marriage. Legal rights, which operate on the whole of the deceased's estate and without regard to the survivor's own assets, would be an alternative way of achieving sharing on the termination of marriage by death. It could be less detailed in defining the property to be shared, but it would not necessarily be any simpler in operation.

4.13 A possible objection to a system of legal rights is that it would further restrict freedom of testation. As against this, however, it has been said that:

> "The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of forty-seven years, is therefore by the standards of comparative jurisprudence an anomaly."30

The principle of absolute freedom of testation would be acceptable only if the view were taken that it is more important to be able to dispose of property than to meet

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29. Para. 4.45 ff.

30. Albery, The Inheritance (Family Provision) Act, 1938 (1950) p. 1. The period of 47 years is that between The Mortmain and Charitable Uses Act 1891, which removed restrictions on devises for charitable purposes, and the Inheritance (Family Provision) Act 1938.

natural and legal obligations to the family. We do not believe this view to have any degree of support; it was rejected in 1938. No one now seriously questions that there are obligations to the family enforceable against the estate; what is in question is how those obligations should be defined and enforced.

4.14 In the following sections we discuss the basic principles of a possible system of legal rights of inheritance, leaving open the question of whether such a system is desirable, and whether it is to be preferred to the other proposals considered in the Paper. We refer in general terms to "the deceased" and "the survivor". It is more common for the husband to die before the wife, and for the bulk of the family assets to be in the husband's name or in joint names, rather than in the wife's name, but the principles discussed are intended to apply equally to husband and wife.

3 WHO SHOULD BE ENTITLED TO LEGAL RIGHTS OF INHERITANCE?

(a) The surviving spouse?

4.15 If a system of legal rights were introduced, in our view the surviving spouse of a valid marriage should be entitled to claim legal rights. A decree of divorce, nullity or judicial separation should bring to an end the right to claim legal rights, just as it brings to an end succession rights on intestacy.[31] The court granting a decree would be able to take into account the possible loss of legal rights in assessing financial provision.[32]

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31. While a decree of judicial separation is in force the separated spouses are not entitled to any rights of intestate succession in each other's estates: Matrimonial Proceedings and Property Act 1970, s.40.

32. Matrimonial Proceedings and Property Act 1970, s. 5(1)(g). A spouse whose marriage has been terminated by a decree may apply for family provision from the estate: in the case of judicial separation, under the Inheritance (Family Provision) Act 1938; in the case of divorce or nullity, under the Matrimonial Causes Act 1965, s. 26; see Part 3 above.

(b) Children?

4.16 Should children be given a fixed proprietary interest in the estates of their parents? The moral obligation to provide for children is as great as that to provide for a spouse. If both spouse and children were given fixed rights of inheritance, family disputes might be avoided. In Scotland children have legal rights,[33] but neither they nor the surviving spouse may apply for family provision. On the other hand, while a surviving spouse would frequently have played a part in building up the family assets it is much less likely that the children would have done so. Further, when their parents die the vast majority would be self-supporting adults independent of their parents. A system of legal rights could not readily distinguish between the independent child and the dependent child. Where the estate was small a system of fixed rights would limit the testator's power to dispose of his estate so as to make provision where it was most needed. In our view, the interests of those children for whom the parent has failed to make proper provision should be protected by the family provision law, under which the court would exercise its discretion, taking into account age, disabilities, means, needs, and other factors.[34]

4 HOW SHOULD LEGAL RIGHTS OF INHERITANCE BE DEFINED?

4.17 Among the various methods of defining legal rights, the following are considered:

(a) A fixed sum

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33. Para. 4.5 above; on intestacy the surviving spouse's rights may exhaust the estate.

34. The rights of children to claim support from a living parent may well need to be strengthened. This problem needs to be considered separately.

(b) A proportion of the estate

(c) A life interest

(d) An equalisation claim

(e) Specific assets: the matrimonial home.

(a) A fixed sum

4.18 Under this method legal rights would be defined as a fixed sum, for example, £2,000. If the estate were less than £2,000 the surviving spouse would take all, to the exclusion of any other beneficiary. On the other hand, if the estate were very large, the fixed sum might represent only a small fraction of it. This does not seem likely to be regarded as satisfactory.

(b) A proportion of the estate

(i) Fixed proportion

4.19 If legal rights were calculated as a fixed proportion of the estate, the survivor's share would increase or decrease with the size of the estate. This is the solution adopted in other countries with legal rights, and appears to be more promising. Whatever proportion were fixed ought to take into account that the estate of the deceased might include property which could not be considered as family assets; it ought also to take into account the probability that some of the family assets were already owned by the survivor. On this basis we would provisionally suggest one-third of the estate as the appropriate amount.[35]

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35. This is a customary proportion and that chosen by the U.S. Uniform Probate Code, s. 2-201.

(ii) Fixed proportion and minimum sum

4.20 If the estate were very small a fixed proportion of it would give the survivor an insignificant sum. In some countries the survivor is entitled to a minimum sum, or a proportion, whichever is the greater.[36] Under a system of this kind, if the estate was less than the minimum sum the deceased would not be able to make a bequest to any other person.[37] This could be avoided by allowing the testator to dispose freely of up to 10 per cent in value of the estate. In the following examples it is assumed that the survivor is entitled to one-third of the estate, with a minimum of £2,000, and that the deceased is permitted to dispose freely of at least 10 per cent of the estate.

Example 1 In an estate of £2,000 the survivor would be entitled to £1,800 (minimum of £2,000, less 10 per cent)

Example 2 In an estate of £5,000 the survivor would be entitled to £2,000 (minimum of £2,000)

Example 3 In an estate of £6,000 or over the survivor would be entitled to one-third (one-third would equal or exceed the minimum sum).

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36. E.g. Denmark: the sum is Kr. 12,000 (about £660).

37. If the surviving spouse were entitled to a minimum sum, there would be a stronger case for allowing all actual dependants of the deceased the right to apply for family provision: para. 3.47 above and 4.67 below.

(iii) Graduated proportion

4.21 Another way of ensuring that the surviving spouse obtained a substantial proportion of a small estate but a lesser proportion of a large estate, would be to calculate legal rights on a sliding scale or "slice" basis. For example, it could be provided that the survivor should be entitled to 80 per cent of the first £5,000 of the estate,[38] 40 per cent of the next £10,000, and 20 per cent of any balance over £15,000.

Example 4 In an estate of £2,000 the survivor would be entitled to £1,600 (80 per cent)

Example 5 In an estate of £10,000 the survivor would be entitled to £6,000

Example 6 In an estate of £20,000 the survivor would be entitled to £9,000.

(iv) Rights on intestacy

4.22 Another way of determining legal rights would be to provide that the surviving spouse should be entitled to receive an amount equivalent to what would have been due if the deceased had died intestate. Under the present law, if a deceased is survived by a spouse and children or their issue, the surviving spouse is entitled to the personal chattels, a fixed sum of £8,750, and a life interest in half the balance, if any. If the deceased is not survived by children or their issue but is survived by a parent, or by a brother or sister (or the issue of either) the surviving spouse is entitled to the personal chattels, a fixed sum of £30,000, and half the balance. In any other case the surviving spouse is entitled to the whole estate.

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38. Of those estates in respect of which representation is granted, about 28% exceed £5,000: 111th Report of the Commissioners of Her Majesty's Inland Revenue for the year ended 31 March 1968, Cmnd. 3879, p. 194.

4.23 The rules of intestacy are based on what a reasonable testator might be expected to do in each of the situations described above, and on what a sample of testators have in fact done. Since only a small minority of estates exceed £8,750,[39] in practice the widow or widower takes the whole estate on intestacy. In the case of a very small estate it might be satisfactory to equate legal rights with intestacy; we have already recognised that in such cases the survivor should receive a substantial proportion of the estate. But it is more difficult to justify giving the whole of a more substantial estate to the widow or widower since this would probably be thought to impose unnecessary limitations on the deceased's power of disposal.

(v) Bequests to children

4.24 Although, in our view, children should not be given direct legal rights, there may be a case for varying the survivor's rights in favour of actual bequests to children. For example, it could be the rule that the deceased must leave at least half the estate to the surviving spouse and children; the surviving spouse must always receive at least one-third of the estate, and could only be given less than one-half if the difference (i.e. up to one-sixth) were given to the children. This could be limited to cases where there was a surviving spouse and children.

(vi) The length of the marriage and the assets acquired during the marria

4.25 If legal rights of inheritance were always calculated as a proportion of the estate, the survivor of a marriage which had lasted less than a year would receive as much as the survivor of a 50 year marriage. If it were thought that the survivor of a short marriage should receive

39. About 15%: ibid.

less, legal rights of inheritance could be calculated on a sliding scale, according to the length of marriage. For example, the survivor could be allowed 2 per cent of the deceased's estate per completed year of marriage, up to a maximum of 50 per cent.

Example 7 In an estate of £5,000, where the marriage had lasted 5 years, the survivor would be entitled to £500 (5 x 2% of £5,000). If the marriage had lasted 25 years or over, the survivor would be entitled to £2,500.

4.26 Another way of relating the survivor's interest in the estate to the length of the marriage and the value of the property built up by the spouses' efforts during the marriage would be to deduct from the estate the value of any property owned by the deceased at the time of the marriage or acquired during the marriage by gift or inheritance before calculating legal rights. This method of calculation would depend on there being available, after the death of a spouse, some record of the value of the property to be deducted. If the deductions could be made, the balance would represent assets which had been acquired by the efforts of the deceased (or of both spouses) during the marriage; this is one way of defining family assets, so that it could then be argued that the survivor should be entitled to half the balance, (i.e. half the family assets owned by the deceased) instead of one-third.

(c) A life interest

4.27 If legal rights were considered as a means of providing support for the survivor, advantages might be seen in defining the rights as a life interest in the estate, especially where the bulk of it consisted of the home. The

deceased would be able to dispose of the ultimate interest in the property, subject to the survivor's life interest, and there would be estate duty advantages in estates over £12,500 in value.[40] On the other hand, a life interest would not give the survivor any capital, and it would be of little value in the case of small estates. Most estates are less than £5,000 in value; only about 10 per cent of estates in respect of which representation is granted exceed £12,500.[41]

4.28 It would, of course, be possible to allow the survivor to commute the life interest, but the capital value would be small in most cases, and would be less for older survivors. In our view the life interest would be acceptable only if it were combined with a fixed minimum capital value. For example, the survivor could be permitted to elect to receive £2,000 or one-third of the estate (whichever was the higher) instead of a life interest in the whole estate. On balance, it seems that the main advantage of the life interest would be in those cases where the bulk of the estate consisted of the matrimonial home.

Example 8 In an estate of £9,000 the survivor could choose between a life interest in the whole, and a capital sum of £3,000.

Example 9 In an estate of £2,000 the survivor could choose between a life interest in the whole and a capital sum of £1,800 (£2,000, less 10 per cent).[42]

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40. No further duty would be payable when the life interest passed on the death of the survivor: Finance Act 1894, s. 5(2); Finance Act 1898, s. 13; Finance Act 1914, s. 14(a) as amended; Green's Death Duties (6th ed. 1967) p. 263 ff.

41. 111th Report of the Commissioners of H.M. Inland Revenue for the year ended 31 March 1968, Cmnd. 3872, p. 194, Table 129.

42. For the testator's 10% reserve, see para. 4.20 above.

(d) An equalisation claim

4.29 Another possibility would be to give the surviving spouse the right to claim from the estate an amount which, when added to the survivor's assets, would be sufficient to give the survivor one-half of the total assets of both deceased and survivor. This would be, in effect, a balancing claim, which would operate only where the survivor's assets were less than the deceased's estate. The attraction of this method of calculation is that it would recognise that spouses ought to share their assets equally. It would also meet one of the objections to a system of legal rights, namely that it gives inheritance rights even where the survivor's assets greatly exceed those of the deceased. Nevertheless, the principle of an equalisation claim is really one form of community of property. In Part 5 we consider the possibilities of such a system which, if introduced, should as we see it apply whether the marriage ends by death or divorce.

(e) Specific assets: the matrimonial home

4.30 As the matrimonial home is often the only substantial asset in the estate, there is a case for saying that legal rights should secure the survivor some interest in it. The rules of intestate succession give the surviving spouse specific rights in respect of the home,[43] but these would not apply where there was a will. We have already made proposals to improve the occupation rights of the surviving spouse and to enable the court to transfer or settle the home in family provision proceedings.[44] If co-ownership of the matrimonial home were introduced, the survivor would have at least a half interest in the home. If, in addition, legal rights were introduced in a form which would give the

43. Intestates' Estates Act 1952, Second Schedule.

44. Parts 1 and 3 above.

survivor a life interest in the whole estate, the survivor would have a right to the home for the rest of his life in addition to his half share in the ownership of it. It therefore does not seem necessary at this stage to consider defining legal rights in terms of an interest in the home. To do so might have the effect of discriminating unfairly against spouses where there was no matrimonial home in the estate.

(f) Summary

4.31 It is the purpose of this Paper to suggest alternatives rather than to decide finally what would be the most appropriate method for calculating legal rights of inheritance. Should they be introduced perhaps the most likely methods are:

(i) to give the survivor one-third of the estate, with a minimum of £2, 000 (examples 1 - 3 above); or

(ii) to allow the survivor to choose between (i) above and a life interest in the whole estate (examples 8 and 9 above).

The final choice might depend on whether family provision were retained and on whether any dispositions by the deceased in favour of third parties or in favour of the survivor were taken into account.[45]

5 RENUNCIATION

4.32 If a system of legal rights of inheritance were introduced it would, in our view, be necessary to allow a spouse to renounce the rights, subject to formal safeguards. This is a usual feature of systems granting legal rights of inheritance,[46] and is in accordance with the view that spouses should be free to agree their respective property

45. See below, para. 4.37 ff.

46. Republic of Ireland: Succession Act, 1965, s. 113; Scotland: para. 4.5 (a) above. See also U.S. Uniform Probate Code, 1969, s. 2-204.

rights. The power to renounce would be an important factor in allowing a spouse to arrange his affairs, for example, to avoid estate duty, or to benefit the children of an earlier marriage. Renunciation might also be a term of a separation agreement. A spouse should be able to renounce legal rights completely, or partially. The dangers of a weaker spouse being forced into a disadvantageous renunciation should be avoided. For example, it might be though necessary to require a document signed by both spouses, and perhaps witnessed by independent solicitors for each spouse. This question would assume even greater importance if legal rights were adopted in substitution for family provision, though provisionally we do not envisage this.[47]

6 BENEFITS RECEIVED FROM THE ESTATE

4.33 A system of legal rights of inheritance would ensure that a surviving spouse who had not been adequately provided for by the will of the deceased received a share of the estate. In contrast to those cases where the survivor is left nothing, there are others in which he or she has received benefits under the will or as a result of a partial intestacy. In our view it should be presumed that the testator did not intend the survivor to have benefits under the will in addition to legal rights, unless there were an express declaration to that effect.[48] In other words, legal rights and benefits under the will should not normally be cumulative.

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47. Paras. 4.38, 4.56 below. The right to apply for family provision cannot now be renounced. We have proposed that in certain cases the parties could make a binding agreement which, if sanctioned by the court, would bar legal rights: para. 3.68 above.

48. cf. Succession (Scotland) Act 1964, s. 13; Republic of Ireland, Succession Act 1965, ss. 114, 115; U.S. Uniform Probate Code, ss. 2-206, 2-207.

4.34 So far as bequests are concerned, there are several ways of achieving this aim:

(i) The survivor might be required to elect between a bequest and legal rights, but could not claim both (this is Scots law).[49]

(ii) The survivor might be allowed to claim legal rights and to elect to take any bequest in partial satisfaction of legal rights (Republic of Ireland).[50]

(iii) The survivor might be required to take any specific bequest (or to reject it outright) and allowed to claim only the balance due as legal rights.

4.35 The following examples illustrate these alternative solutions. H leaves a net estate of £6,000 and makes a specific bequest to W of a piece of silver valued at £500; her legal rights are £2,000.

(i) She must elect between the silver and the £2,000.

(ii) She is entitled to claim £2,000 and may take the silver in partial satisfaction if she wishes.

(iii) She may take the silver and claim £1,500 as the balance of legal rights, but if she rejects the silver she cannot claim more than £1,500.

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49. Para. 4.5 (b) above.

50. Succession Act 1965, ss. 114, 115.

On balance, it is our view that the second of these alternatives should apply, and that the survivor should be entitled to elect whether to take any specific bequest in partial satisfaction of legal rights.

4.36 Where the interest left to the survivor is not a specific bequest or outright legacy, there may be cases where it is impossible or very difficult to value it precisely. For example, the survivor may be left a life interest with a power of advancement, or an interest under a discretionary trust. If the survivor wished to claim legal rights of inheritance, then, in our view, any interest of this nature should be forfeit.

7 INTER VIVOS DISPOSITIONS BY THE DECEASED

4.37 So far, we have discussed the effect of legal rights on the property forming the estate of the deceased. In a logical system of legal rights, it may sometimes be thought fair to take into account property which the deceased had disposed of during his lifetime. For example, if a deceased husband had given to a third party a substantial portion of his assets shortly before his death, perhaps with the intention of reducing legal rights, it might be unfair to his widow if this could not be taken into account and, if need be, set aside. On the other hand it might be unfair to the other beneficiaries if the survivor had received large amounts of property from the deceased during joint lives, and then claimed a further share of the deceased's assets as legal rights. In this section we deal with both aspects of this problem.

(a) Dispositions in favour of third parties

4.38 A system of legal rights would not benefit a surviving spouse unless the deceased had left at least some property in his estate. The system would be totally

ineffective if the deceased could give away all his assets to third parties during his lifetime. This, as we have seen, is also a question which concerns family provision. Under present law assets disposed of by the deceased during his lifetime cannot be called upon to meet a successful application for maintenance from the estate. Proposals to give the court power to set aside certain dispositions were made in Part 3.[51] If family provision law were retained, and reinforced with measures to prevent avoidance, it might not be necessary to take into account third party dispositions in a system of legal rights. But if legal rights of inheritance were considered as a substitute for family provision,[52] it would be important to have adequate measures to conteract attempts at avoidance: first, because a spouse who wished to disinherit the other spouse might have a stronger incentive to do so than under a system which merely entitled the survivor to claim reasonable maintenance; secondly, because a disposition might have a more substantial effect on a fixed right to inherit a proportion of the estate than on an application for family provision, where the survivor's claim to maintenance could be charged, if need be, on the whole estate.

4.39 For these reasons, it is necessary to consider whether certain dispositions of the deceased which affect the survivor's legal rights of inheritance should be brought into account for the purpose of calculating legal rights,[53] and whether, if the estate is insufficient to satisfy the

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51. Para. 3.69 ff. above.

52. This question is considered below, paras. 4.56 and 4.65.

53. The gravity of the problem of transactions intended to defeat the survivor's share has been recognised in the United States: Macdonald, Fraud on the Widow's Share (1960); U.S. Uniform Probate Code, s. 2-202, para. 4.42 below.

legal rights, it should be possible to set aside the disposition in whole or in part.

4.40 In relation to family provision, it was suggested that the court should have power to intervene in respect of any transaction not for value made with the intention of defeating the claim of a dependant. It was proposed that in the case of transactions made less than three years before death this intention could be presumed, in the absence of evidence to the contrary, if the transaction had the effect of preventing, or reducing the amount of, an order for family provision.[54] The test, therefore, would be whether the remaining assets were sufficient to enable the deceased to make adequate provision for the maintenance of his dependants.

4.41 A similar test is applied by the Republic of Ireland Succession Act 1965. Under section 121(2)

> "If the court is satisfied that a disposition... was made for the purpose of defeating or substantially diminishing the share of the disponer's spouse, whether as a legal right or on intestacy, or the intestate share of any of his children, or of leaving any of his children insufficiently provided for, ... the court may order that the disposition shall, in whole or in part, be deemed ... to be a devise or bequest made by him by will and to form part of his estate, and to have had no other effect."

A solution of this nature appears simple, but in our view it could give rise to difficulties, since it would be necessary to prove the intentions of the deceased and not merely the effect of the disposition. No doubt the most flagrant cases would be caught, but in others there could be doubts, disputes and protracted litigation to test the real intention of the donor. For example, if a man with assets of £10,000 gave his son £2,000 to set him up in business, how could one establish

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54. Para. 3.72 above.

whether his main motive was advancement of the son, or reduction of the wife's legal rights? Even if there were a rebuttable presumption in respect of certain dispositions there would be uncertainty until the matter had been decided.

4.42 An alternative approach would be to provide that transactions of a certain type should be taken into account regardless of intention or effect. This is the solution adopted by the U.S. Uniform Probate Code.[55] A precedent can also be found in estate duty law,[56] though that serves a different purpose. We are concerned only with dispositions made during the marriage, and which were not for valuable consideration. They appear to fall into two main categories:

(a) Dispositions made by the deceased during his lifetime which did not become fully effective until his death (these would include interests under joint tenancies created by the deceased in favour of himself and another); and dispositions under which the deceased retained an interest or a power to dispose during his lifetime or by will.

(b) Outright gifts in favour of third parties.

4.43 There are several ancillary problems to consider. As far as the first category is concerned, there would normally be an identifiable fund which could be valued as at the date of death. Since the disposition would not become fully effective until the death, there would be no need to

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55. s. 2-202.

56. Finance Act 1894, s. 2(1) as amended: property passing on death includes certain dispositions which take effect at the time of death.

impose a time limit on the dispositions which should be taken into account. The second category gives rise to greater difficulty. We would suggest that the precedent of estate duty law be followed,[57] i.e. that gifts of cash be taken at their face value, and that gifts of property be valued at the date of death unless they have earlier been disposed of for full cash value. As it would obviously be impractical to go back over the whole history of the marriage and to investigate every gift, however large or small, we would further suggest that only gifts within seven years and exceeding a total of £500 in favour of any one donee be taken into account.[58] A rule could be adopted similar to the estate duty rule under which gifts are excluded if they are part of the normal expenditure of the deceased.[59] If the surviving spouse had consented to any particular disposition in such a way as to show an intention to waive legal rights in respect of the property disposed of, that disposition should not be brought into account.

4.44 On balance, we think that a system of this type, under which certain dispositions are brought into account regardless of intention, is preferable to a more general discretionary anti-avoidance provision, which would introduce a greater measure of uncertainty. There remains the question what effect these dispositions should have on legal rights. In our view, if the deceased had made a

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57. See Finance Act 1957, s. 38; Green's Death Duties (6th ed. 1967) p. 145 ff.

58. Finance Act 1968, s. 35(1); Finance Act 1949, s. 33.

59. Finance Act 1968, s. 37(1): to qualify for exemption, the gift must have been part of the normal (i.e. habitual) expenditure of the deceased made out of income, and the deceased must have had sufficient income left to maintain his usual standard of living.

relevant disposition, the net value of the property comprised therein should be added to the net estate,[60] and the legal rights of the survivor should be calculated as a proportion of this total. Assuming that there was a balance due to the survivor, then in our view it should be satisfied, in the first instance from the estate. It should be presumed that by making a disposition during his lifetime the deceased wished to show preference for the recipient. The beneficiaries of inter vivos dispositions should be called upon to contribute to legal rights only if the estate proved insufficient, and to the extent directed by the court, which, to avoid hardship, should be given a discretion.

(b) Dispositions in favour of the survivor

4.45 If the survivor were entitled to increase the amount due as legal rights by bringing dispositions to third parties into account, this would have the effect of reducing the share in the estate of other beneficiaries.[61] It might be unfair to those other beneficiaries if the survivor did not account for similar inter vivos dispositions by the deceased in his or her favour. If the survivor had to account for such dispositions it would help to ensure that claims to legal rights were made only in those cases where there had been a genuine failure to make proper provision for the survivor. Some systems require the survivor to bring certain benefits into account,[62] though there is no general rule to this effect in Scotland.[63]

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60. "Net" in this context means after deduction of estate duty.

61. Since legal rights are to be satisfied from the actual estate in the first instance, the beneficiaries' share will decrease whenever a disposition in favour of a third party is taken into account.

62. Republic of Ireland, Succession Act 1965, s.116: permanent provision for a spouse is to be regarded as being made towards satisfaction of legal rights; U.S. Uniform Probate Code, s.2-202 (3).

63. But see para. 4.5(a) above.

4.46 There are, however, arguments against taking into account dispositions in favour of the survivor. It would add to the complication and would give rise to further problems, some of which are considered below. If the donor wished any particular disposition to be in satisfaction, or partial satisfaction, of legal rights, an agreement could be made to waive legal rights wholly or in part.[64]

4.47 If it were decided not to take into account any dispositions in favour of the survivor, the proportion of the estate given to the survivor as legal rights might be fixed at a lower figure. For the moment we leave open this question, and go on to consider how the survivor could be called upon to account for benefits received from the deceased.

(i) Dispositions to be taken into account

4.48 One method would be to take account of all property actually owned by the survivor at the date of the deceased's death, which had derived from the deceased by way of gift. The United States Uniform Probate Code contains a rule of this nature;[65] it is reinforced by a list of certain categories of property (which are not exclusive) which are to be taken into account and by a rebuttable presumption that all property owned by the survivor at the death of the deceased was derived from the deceased. An alternative method would be to take account of all property which had, during joint lives, been the subject of certain specified dispositions by the deceased

64. See the Scottish rule, above, para. 4.5(a). Such an agreement should be subject to the safeguards referred to earlier (para. 4.32).

65. s.2-202(3); account is also taken of property which had been the subject of certain voluntary dispositions by the survivor.

in favour of the survivor. The relevant dispositions would correspond roughly with the dispositions in favour of third parties which were considered above. We now consider some of the problems arising in respect of particular kinds of disposition.

Outright gifts

4.49 The effect on legal rights of an outright gift in favour of a third party would become more remote as time passed; it would also be impractical to have to trace all such gifts made during a marriage. For this reason we suggested a time limit of seven years on third party gifts.[66] Where a gift was made to the survivor, however, the question is not so much whether the deceased depleted his estate within a relatively short period before his death, but whether a share of his property had passed to the survivor. If the survivor held assets derived by gift from the deceased, it may be thought that the date of the gift is irrelevant, and that there should be no time limit. As in the case of third party gifts the property should be valued as at the date of death, except that gifts in cash should be brought in at their face value. The exemptions suggested for gifts to third parties which were part of the normal expenditure of the deceased, and gifts under £500 should also apply to gifts to the survivor.[67]

Joint interests

4.50 If the survivor and the deceased were joint tenants of any property, then in our view the value of the interest accruing to the survivor should be taken into account when assessing legal rights. This rule should apply however the joint interest had been created, i.e. whether it was a transfer by way of gift by the deceased,

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66. Para. 4.43 above.

67. See para. 4.43 above, and n. 59.

whether it was the result of a joint purchase, or whether it was effected by operation of the co-ownership principle discussed in an earlier part of the Paper.

Life insurance, annuities, pensions

4.51 The deceased may have provided for his spouse in such a way that benefits were payable directly to her on his death, without forming part of his estate,[68] for example: a life insurance policy which was held in trust for his spouse; a joint annuity with survivorship to the spouse; or a pension payable by his employer to his widow in return for his services or contributions during his life. All such benefits should be taken into account, provided they are capable of valuation as a present interest.

Settlements, powers of appointment

4.52 The deceased, during his lifetime, may have settled property, giving his spouse an immediate interest for life, or an interest to take effect on his death. Any such interest ought to be accounted for, whether it arose under the original settlement or as the result of the exercise of a power of appointment by the deceased. However, in view of the difficulties of valuation in such cases, especially where there was a discretionary trust, we suggest the survivor should be put to an election, that is, if she claimed legal rights she should be required to abandon for the future her interest under the settlement.

Other property

4.53 Certain other categories of property and benefits received by the survivor give rise to difficulties which

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68. Whether or not liable for estate duty.

are not considered here, but which would also need to be settled if a system of legal rights were introduced. These include: payments made by the deceased or his estate under a court order or maintenance agreement; and property or interests received by the survivor as a result of the exercise by the deceased of a special power of appointment.

(ii) Effect on legal rights

4.54 As in the case of dispositions in favour of third parties, the net value of the property comprised in any relevant dispositions in favour of the survivor should be added to the net estate. Assuming, for the moment, that legal rights were fixed at one-third, then if the survivor had already received one-third of the total accountable property including all relevant inter vivos dispositions, he or she would not be entitled to legal rights, whether or not anything had been received under the will. If less than one-third had been received, the survivor should be entitled to claim the difference from the estate.

(c) Conclusions concerning inter vivos dispositions

4.55 Though it may be both logical and fair to take into account certain inter vivos dispositions, this section of the Paper has shown that to do so could in some cases involve great complexity and lead to litigation which could well be bitter, expensive, and in its outcome uncertain. This, however, is likely to occur only in the case of large estates; the majority of estates are unlikely to give rise to many difficulties. Provisions dealing with inter vivos dispositions are not universal in systems of legal rights. In Scotland, for example, no account can be taken of gratuitous inter vivos dispositions by a testator, even if they were expressly made to defeat legal rights.[69]

69. Para. 4.5 (c) above.

4.56 We suggest that there may be a case for a simple system of legal rights, operating only in respect of the estate as it exists at the time of death. But for the reasons already given[70] such a system ought not to be proposed as a substitute for family provision law, but only as additional. Its function would be to set a minimum standard of provision for the surviving spouse and so reduce the number of applications for family provision. Family provision law would remain to deal with cases where the amount secured by legal rights was inadequate or where inter vivos dispositions had reduced the estate to the detriment of the survivor.

4.57 To summarise, it seems that, so far as inter vivos dispositions are concerned, there are three possible systems of legal rights of varying degrees of effectiveness and complexity:

A. A simple system operating only on the estate, under which no inter vivos dispositions by the deceased would be considered; such a system would require the continuance of a family provision law to supplement legal rights where they were inadequate to support the surviving spouse.

B. A system with anti-avoidance measures, to overcome attempts by a deceased to reduce legal rights by inter vivos dispositions in favour of third parties. This could be considered as a substitute for family provision law.

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70. Para. 4.38 above.

C. A system with both anti-avoidance measures and measures under which the survivor must give credit for dispositions in his or her favour. This, too, could be considered as a substitute for family provision law.[71]

8 MISCONDUCT AS A BAR TO LEGAL RIGHTS

4.58 The complexities of a system of legal rights do not end with the calculation of the amount due to the surviving spouse. The next question is, should a survivor's legal rights be barred or varied on the ground of misconduct? This is a difficult question. One of the advantages claimed for a system of legal rights is its certainty; it would operate automatically, without the need to apply to the court for the exercise of its discretion. We have already indicated that the survivor's own assets and means would be irrelevant (except, possibly, insofar as they were derived from the deceased). If misconduct were to debar a spouse's claim to legal rights, a discretionary element would be introduced which could lead to delays in administration, and costs of litigation.

4.59 In certain countries a spouse guilty of misconduct can be deprived of legal rights.[72] Clearly, the English rule of public policy under which a person who has been guilty of criminal homicide is precluded from taking any benefit under the will or intestacy of the victim[73] would apply to legal rights, if they were introduced. But what we have in mind is not the criminal law but the rights of

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71. On this see below, para. 4.66.

72. E.g. Germany, Republic of Ireland. There is no such rule in Scotland, nor under the U.S. Uniform Probate Code.

73. Re Sigsworth [1935] Ch. 89; Re Pollock [1941] Ch. 219; Re Callaway [1956] Ch. 559; Re Gilles, The Times, 5 May 1971, p. 8.

a spouse who before the death of the other failed to fulfil matrimonial obligations.

4.60 The chief argument in favour of a discretionary bar is that it would be unfair to allow a spouse who had failed to fulfil matrimonial obligations to claim a share in the other's estate. If a spouse could not be deprived of legal rights, the other spouse might be forced to seek a divorce, in order to end the possible entitlement to legal rights.[74] On an application for family provision the court must take into account not only the means and needs of the survivor, but also his or her conduct. But, although these factors are relevant to the extent of the liability to maintain, it does not follow that they should be regarded as relevant to legal rights, which are put forward as rights of property. It can be argued that conduct is no more relevant than means or needs and that misconduct should not necessarily result in their loss; they should not be barred unless there has been a decree of divorce, nullity or judicial separation, in which case the court would have an opportunity to deal with the spouses' property in the matrimonial proceedings. Further, it might be thought particularly objectionable if, after the death of a spouse, the personal representatives or beneficiaries could make allegations of misconduct against the survivor, in order to bar or vary legal rights, especially if the parties had been living together until the death. Finally, the delays and costs of litigation must not be forgotten.

4.61 This is an important issue and one on which views will differ. If it is thought that legal rights should be barred or varied on discretionary grounds, then the system

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74. See above, para. 4.15. We suggest that the court should, in appropriate cases, take into account the loss of legal rights in assessing financial provision; cf. the Matrimonial Proceedings and Property Act 1970, s. 5(1)(g).

would lose its proprietary character and its advantage of certainty. Of course, there would not necessarily be recourse to the court in every case where legal rights were claimed. The onus would be on the person seeking to deprive the survivor rather than on the survivor. Nevertheless, both legal rights and family provision operate in practice where the deceased has not made proper provision for the survivor. When that occurs, there is likely to have been breakdown of marriage or at least disharmony. In that situation it cannot be assumed that there would be fewer disputes over legal rights than there are now over family provision. In our view one advantage of legal rights is that it would not be necessary to go to court. This advantage could be lost in many cases if a discretionary element were introduced. Therefore we are of the opinion that legal rights should not be barred or varied on the ground that the surviving spouse failed to fulfil matrimonial obligations.[75]

9 INTESTATE SUCCESSION

4.62 In an earlier section we considered whether legal rights could be equated with rights on intestacy. Here we consider the relationship between legal rights and intestacy. Where the estate is large the legal rights may exceed the survivor's rights on intestate succession. For example, if the estate were £60,000 after payment of all duties, the legal rights of the survivor, if defined as one-third of the estate, would be £20,000. If the deceased was survived by children then, depending on the capital value of the survivor's life interest in the estate, the rights on intestacy might be more or less than £20,000. This leads to

75. Legal rights could be waived or varied by agreement (para. 4.32 above), and would be brought to an end by a decree of divorce, nullity or judicial separation (para. 4.15 above).

the question, should legal rights be defined in such a way that they cannot exceed the amount which would have been due to the survivor on intestacy? Legal rights are intended to operate in cases where the testator has not made proper provision for the survivor, i.e. in cases where there is a will. In our view legal rights should not, as a general rule, give the survivor more than he or she would have received had the deceased died wholly intestate. It would, however, be necessary to make an exception to this rule, where the actual estate was not the total accountable sum for the purpose of legal rights, because certain inter vivos dispostions had to be taken into account. For example, if there had been an accountable disposition of £2,500 and an intestate estate of £500, the surviving spouse would take the £500 on intestacy and would be entitled to a further £500 making £1,000 (one-third of £2,500 + £500), assuming that legal rights were fixed at one-third of the estate.

4.63 If the deceased died partly testate and partly intestate the survivor would not necessarily be debarred from claiming legal rights. In such a case the amount due to the survivor on intestacy should be regarded as a bequest under the will, and then the ordinary rules concerning legal rights should come into operation. For example, if the deceased left an estate of £5,000 and was intestate as to £1,000, then, the surviving spouse would take the £1,000 under the rules of intestate succession. Assuming that he or she took nothing under the will a further £666 would be due as legal rights, to bring the total benefits to £1,666 (one-third of £5,000, assuming that legal rights were calculated in this way). On the other hand if the deceased, in the above example, had been intestate as to £4,000, this amount would go to the survivor and nothing further would be due as legal rights.

10 PROCEDURE

4.64 If a system of legal rights were introduced detailed rules would have to be provided to cover such things as the survivor's notice of election to claim legal rights, jurisdiction to determine disputes, and the procedure for bringing into account and setting aside dispositions. It is essential that in uncomplicated cases the personal representatives should be able to calculate the amount of legal rights and to pay the survivor without resort to the court. In order to achieve this, some indication should be given of the order of application of assets. A precedent for the order of application of assets to satisfy debts of the estate is already provided by the Administration of Estates Act 1925.[76] Although these rules have been criticised, and may well need reform, it seems preferable to adopt them while they exist, rather than to devise a new set of rules. Subject to any direction to the contrary contained in the will, these rules could be adapted to the payment of legal rights of inheritance.

11 FAMILY PROVISION AND LEGAL RIGHTS

(a) Legal rights or family provision

4.65 Both legal rights of inheritance and family provision law are designed to take care of the case where a deceased has accidentally or deliberately failed to make adequate provision for the surviving spouse. What is adequate would be decided in the case of legal rights by a fixed rule, and in the case of family provision by a court exercising its discretion in the light of all the circumstances. Legal rights would have the advantage of establishing a fixed standard capable of application without resort to the court; family provision enables the court to do

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76. First Schedule, Part II (section 34(3)).

justice in the light of the actual circumstances of the estate and the survivor.[77]

4.66 In an earlier part of the Paper we made the point that a system of legal rights could not be considered as a substitute for family provision law unless it were reinforced by anti-avoidance measures.[78] Assuming that suitable measures were included, the question remains whether the survivor's legal rights should replace the right to apply for family provision. It would lead to further complication in the administration of estates if a system of legal rights were added to the existing family provision law, and the advantage of certainty, which legal rights would otherwise secure, would be diminished. On the other hand, legal rights cannot take account of the circumstances of each case; some survivors might do worse than under family provision; though this would to some extent depend on the proportion of the estate fixed as legal rights. Since this is a fundamental question, on which there are likely to be different views, we can do more than leave the matter open to discussion, while expressing the tentative view that a place could be found for each system in the reformed law.

(b) Effect of legal rights on other dependants

4.67 Should that part of the estate due to the surviving spouse as legal rights be chargeable with any part of an order for family provision in favour of any other dependant? At present, the only other persons who are entitled to apply

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77. For arguments in favour of discretion rather than fixed shares, see Tyler, Family Provision (1971) p. 112-113; Macdonald, Fraud on the Widow's Share (1960) p. 299. On the other hand see Guest (1957) 73 L.Q.R. 74, 87. See para. 4.10 above for a comparison between legal rights and family provision.

78. Paras. 4.38 and 4.56 above.

for maintenance from the estate are the children[79] and any former spouse of the deceased.[80] The court may direct that the order for family provision be met out of any part of the estate and that any part of the estate be set aside for this purpose.[81] This means that a bequest in favour of one dependant is potentially liable to be charged with a maintenance order in favour of another dependant. Even if one considered legal rights of inheritance as providing for the survivor a fixed proprietary interest in the estate, it would not follow that the survivor's interest should take precedence over other obligations of the deceased. For example, the needs of the minor children of the deceased ought not to be prejudiced by the introduction of a system of legal rights. The obligation to support children should be the first charge on the deceased's assets, whether or not the deceased's children are also the children of the survivor. It could also be argued that the rights of a former spouse ought not to be prejudiced by the legal rights of inheritance of a second spouse. Our provisional view is that legal rights should not stand in a position different from that of other bequests to the surviving spouse.

4.68 Under legal rights, the survivor would have a right to a fixed portion of the estate even if he or she owned more property than the deceased. There would probably be few cases where it would be necessary to have recourse to legal rights in order to meet applications for family provision by other dependants. But there might be cases where it would be thought, after taking into account all the circumstances, that the interests of other dependants outweighed those of the survivor. Where there is an applicatio

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79. Inheritance (Family Provision) Act 1938, as amended, s.1(1). We have considered whether the class of applicants should be extended: para. 3.47 above.

80. Matrimonial Causes Act 1965, s. 26.

81. Re Simson [1950] Ch. 38; Re Preston [1969] 1 W.L.R. 31

for family provision it seems preferable that the whole estate should go into the melting pot, and that no part of it should be exempt; no part would be exempt if the survivor were to apply for family provision. On balance, we do not think it appropriate to exempt the amount due to the survivor as legal rights from being charged with any order for family provision.

12 CONCLUSIONS AND SUMMARY

4.69 We have put forward three possible systems of legal rights:[82] a simple system, under which no account would be taken of inter vivos dispositions by the deceased, and two more complex systems under which inter vivos dispositions in favour of third parties (and, under one of those systems, dispositions in favour of the survivor) would be taken into account. The arguments for and against each system have been set out.[83] In our view the survivor's right to apply for family provision could not be replaced except, possibly, by one of the more complex systems.

4.70 Although certain important questions have been left open, enough has been said to make it possible to consider the advantages and disadvantages of a system of legal rights as a means of protecting the survivor's interest in the family assets, and to compare it with the system of community of property discussed in the next section. The community system would apply to every marriage, however it ended, and would require the family assets of the spouses to be equalised. Legal rights of inheritance, on the other hand, would come into operation only when the marriage ended by death and only if one spouse disinherited or failed accidentally to make proper provision for the other, that is, only in a small minority of cases. Because of this, although both systems

82. Para. 4.57.

83. Paras. 4.55-4.57.

would give definite property rights, legal rights would probably have much less impact than community of property. Their chief effect would be to set a fixed minimum standard of provision for the survivor. Since legal rights would operate on the whole estate of the deceased, their value might be easier to calculate than the value of rights enjoyed under a system of community of property.

4.71 On the other hand a system of legal rights would be an imprecise way of protecting the survivor's interest in the family assets. It would take no account of the fact that the bulk of the family assets might already be vested in the survivor: the survivor's assets would be irrelevant unless derived from the deceased. It would not be limited to that part of the deceased's estate which could properly be regarded as family assets, and since it would operate only on death it would create a distinction between property rights on divorce and those on death.

Summary of propositions concerning legal rights

4.72 In order to assist readers in forming a view we set out below the main principles which we envisage as part of a system of legal rights of inheritance. This does not mean that we favour legal rights of inheritance over any other system. It merely represents our tentative views as to how they could be applied if they were introduced. There are, of course, many matters of detail which would remain to be decided before any system could be introduced. We set out as preliminary questions the matters which we have left open

Preliminary questions

(i) If a system of legal rights were introduced into English law, which of the following would be best?

A. A simple system operating only on the estate, under which no inter vivos dispositions by the deceased would be considered.

B. A system with anti-avoidance measures to overcome attempts by the deceased to reduce legal rights by inter vivos dispositions in favour of third parties.

C. A system with both anti-avoidance measures and measures under which the survivor must give credit for dispositions by the deceased in his or her favour. (para. 4.57)

(ii) If any of the above systems were introduced, should the right of a surviving spouse to apply for family provision be abolished? (paras. 4.65-4.66)

(iii) What proportion of the estate should be given to the surviving spouse as legal rights? (paras. 4.17-4.31).

Provisional propositions (assuming that legal rights were introduced)

(i) The surviving spouse of a valid marriage should be entitled to legal rights of inheritance, provided there had not been a decree of divorce, nullity or judicial separation (para. 4.15)

(ii) The children of the deceased should not be entitled to legal rights of inheritance (para. 4.16).

(iii) A spouse should be entitled to renounce legal rights of inheritance, subject to safeguards (para. 4.32).

(iv) If any bequest or interest in the estate were left to the surviving spouse, the survivor should be entitled to elect whether to take it in partial satisfaction of legal rights. In the absence of express declaration to the contrary, the bequest should not be in addition to legal rights (paras. 4.33-4.35).

(v) If the survivor were left a life interest or other limited interest, the survivor should elect between this interest and legal rights of inheritance (para. 4.36).

(vi) If it were decided that account should be taken of certain inter vivos dispositions by the deceased in favour of third parties, the net value of the property comprised therein should be added to the net estate for the purpose of calculating legal rights (para. 4.44).

(vii) Legal rights of inheritance should be satisfied in the first instance from the estate of the deceased (para. 4.44).

(viii) If it were decided that the survivor should account for certain inter vivos dispositions in his favour by the deceased, the net value to the survivor of the property comprised in these dispositions should be added to the net estate for the purpose of calculating legal rights (para. 4.54).

(ix) There should be no discretionary power to bar or vary legal rights on the ground that the surviving spouse failed to fulfil matrimonial obligations (para. 4.61).

(x) The legal rights of inheritance of a surviving spouse should not be exempt from being charged with an order for family provision in favour of a former spouse or child of the deceased (para. 4.67).

PART 5

COMMUNITY OF PROPERTY

1 INTRODUCTION

5.1 In this Paper we have considered various proposals under which a spouse could acquire fixed property rights in respect of certain assets which under present law would be regarded as belonging solely to the other spouse. For example, co-ownership of the matrimonial home (Part 1) would give each spouse an equal beneficial interest in the home irrespective of the legal title or of financial contribution; legal rights of inheritance (Part 4) would give the surviving spouse a fixed share in the assets of the deceased spouse. One objective of these proposals would be to remedy the present position under which a spouse who has no earnings or other means, and who is unable to contribute financially to the acquisition of the family assets, cannot acquire any interest in them except by a gift or bequest from the other spouse; but the proposals would apply generally, and are not limited to that situation.

5.2 We now consider another system of fixed property rights, under which the spouses would share certain of their assets on the termination of the marriage. We refer to this loosely as a system of "community of property", although it is only one example of different kinds of system called by this name. In effect, under the system outlined the spouses would own their property separately during marriage and would share at the end of the marriage. One justification for such a system can be found in the idea that marriage should be considered as a partnership, in which the spouses fulfil

different, but equally important roles, and in which they share their gains and losses.[1]

5.3 Systems of community of property can be divided into three broad categories: full community;[2] community of gains;[2] and deferred community, or participation.[3] One factor common to all these systems is that, either during the marriage or on its termination, certain of the spouses' property forms a community in which each has an equal interest. Another factor common to countries where community of property applies is that the spouses are free at the beginning of the marriage (and sometimes later) to agree that the community regime should not apply to their property; they may instead choose a different regime, including that of separate property. The details of systems, even those within the same category, vary enormously, depending mainly on how they deal with each of the following questions:

(i) Does all the property of both spouses come within the community, or do certain categories of property remain outside the community as the separate property of the spouses?

(ii) During the marriage does the community property form a distinct fund, or do the spouses retain independent control over their property (community and separate) until the time for division of assets?

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1. See the views of a minority group of the Morton Commission favouring community of property: paras.5.25-5.26 below; Law Commission, Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, para. 78.

2. See Appendix I, p.317 below.

3. Para. 5.11 ff., below.

(iii) If there is a community fund, who may exercise powers of administration over it?

(iv) Are there any restraints on the powers of either spouse to deal with (a) the community fund; or (b) the separate property?

(v) To what extent is a spouse liable for the debts incurred by the other spouse before and during the marriage?

(vi) In what circumstances will the community be ended and the assets divided between the spouses?

(vii) When the community is ended, does either spouse have a claim to any specific assets, or only a money claim?

(viii) Has the court any power to vary the shares of the spouses and, if so, on what grounds?

5.4 In this Paper it would be impracticable to describe all the systems of community. We have examined the development of community systems in several countries, and as a result we have come to provisional conclusions as to the type of system which we think could be considered for adaptation to English law.

5.5 Most continental countries have had systems of community for many years. Although the older systems differed, one from another, in many respects they had one feature in common: the husband had exclusive rights of administration. This can, of course, be compared with the situation in England prior to 1882. The movement for the emancipation of women brought with it in all countries

pressure to reform the law of matrimonial property. In England the result was a separation of property. But countries which already had community systems did not abandon them. Instead, they sought to improve the position of married women within the framework of the community system: in particular, by extending a married woman's power to administer certain property.

Scandinavia and Germany

5.6 One significant development was the introduction by the Scandinavian countries in the 1920s of a system of community incorporating a new principle.[4] This principle was that during marriage each spouse should have equal rights to acquire, deal and dispose of property independently of each other, but at the end of marriage each should have a half share of the total remaining property of both spouses. The system is still in force in Sweden, Norway, Denmark, Finland and Iceland.

5.7 The old German law included a system of community: the husband enjoyed rights of administration. In 1957 the Law on Equal Rights of Men and Women introduced a new statutory regime for matrimonial property (Zugewinngemeinschaft).[5] As under the Scandinavian laws, each spouse retains equal and independent power to own and administer property during marriage. At the end of marriage each is entitled to half the surplus, i.e. the amount by which the total of the property owned by both of them at the end of th marriage exceeds the value of the property owned by them

4. I.M. Pedersen, "Matrimonial Property Law in Denmark" (1965) 28 M.L.R. 137-138.

5. Cohn, Manual of German Law, Vol.1 (2nd ed. 1968) s.510; Müller-Freienfels, "Equality of Husband and Wife in Family Law"(1959) 8 I.C.L.Q. 249.

before the marriage. While under German and Scandinavian law spouses may contract out of the statutory system, we are informed that few do so.[6]

France

5.8 In France, the traditional system of full community under which the husband administered the property has been transformed over the years by laws allowing married women to control and manage their own earnings and savings. A major reform of the system was effected in 1965. Prior to this reform a social survey was conducted, which showed that most people thought a community regime of some sort preferable to a separate property regime.[7] Even under the old law it seems that no more than 7 per cent of married couples contracted for a regime of separate property.[8] The terms of the new regime, called community of acquests, were fiercely contested, particularly as regards the spouses' powers of management. The result was a compromise: the husband is the nominal head of the community with powers of management over it, but the wife's consent must be obtained for many transactions, and she is given independent power to administer her separate property.[9] The property falling into the community is limited to that acquired during the marriage other than by gift or inheritance; but each spouse's income and earnings remain the separate property of that spouse. It has been said that the regime is more separatist than community.[10] The overall effect is similar to that under the Scandinavian and German regimes.

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6. Pedersen (1965) 28 M.L.R., at 139.

7. (1967) 29 Sondages: revue française de l'opinion publique 41-43.

8. Ibid. pp. 19,23.

9. See Amos and Walton's Introduction to French Law (3rd ed. 1967) p.382.

10. Mazeaud, Leçons de Droit Civil, Tome 4, Vol.1, Régimes matrimoniaux (2nd ed. 1966) pp.112-115.

Quebec and Ontario

5.9 Quebec has introduced reforms to its traditional matrimonial regime which was based on French law. The new regime is based on Scandinavian and German law;[11] it allows the spouses indpendent powers of ownership and management during marriage. At the end of marriage all property acquired during the marriage other than by gift or inheritance is subject to partition. Ontario, which at present has separation of property, is moving towards the Scandinavian and German systems of community. The reasons for these developments in the French and English Provinces of Canada are indicated in the Report of the Royal Commission on the Status of Women in Canada:[12]

> "[W]e recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources."

Israel is proceeding on similar lines. We summarise below both the Ontario and Israel proposals.[13]

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11. Statutes of Quebec, 1969, c.77 (in force 1 July 1970), implements the Report of the Matrimonial Regimes Committee of the Civil Code Reform Commission, 1966. According to the Report, over a 5 year period 70% of persons marrying adopted a regime different from that in force under the old law: para.6; see also para.9.

12. 1970, Chapter 4, "Women and the Family", para.89, p.246; Recommendation No.107, p.410.

13. Paras. 5.21 and 5.22.

5.10 Our examination of the theory and practice of foreign systems, though limited, has shown that one of the important factors affecting the development of community systems has been the desire to accord to married women independence and equality of power with their husbands. No system has found it practical to introduce joint management in respect of all property.[14] The modern solution is to allow each spouse to acquire, deal with and dispose of his or her own property independently during the marriage, and to defer the sharing of property until the end of the marriage. In our view a system of community could not be considered for England unless it preserved a principle of independent management during marriage. We, therefore, propose to consider in more detail some of the modern systems which incorporate this principle.

14. See Kahn-Freund (1959) 22 M.L.R. 241, 243-244; Kisch, "The Matrimonial Community: Property and Power, as illustrated by recent developments," in Festchrift für Max Rheinstein (1969) pp. 975, 984 ff. See also Amos and Walton's Introduction to French Law (3rd ed. 1967) p.382.

2 SYSTEMS OF DEFERRED COMMUNITY OR PARTICIPATION

(a) Scandinavia, Germany and Holland

5.11 As we have seen, systems of deferred community were first introduced in Scandinavian countries in the 1920s to replace the traditional systems of full community.[15] Western Germany made a similar change in 1957.[16] The Dutch system, introduced in 1956, is in effect a system of deferred community, though it is in some ways different.[17] Under all these systems each spouse has the right to acquire and dispose of his or her own property during the marriage.

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15. DENMARK: Law No. 56 of March 18, 1925; I.M.Pedersen, "Matrimonial Property Law in Denmark" (1965) 28 M.L.R. 137; Danish and Norwegian Law (1963). SWEDEN: Marriage Code of 1920, Chapter VI; Friedmann, ed., Matrimonial Property Law (1955) p. 410; Sussman, "Spouses and their Property under Swedish Law" (1963-64) 12 Am.J. Comp.L. 553. A committee of experts is now undertaking a revie of the whole field of Swedish family law. Among the principles under consideration is that of restricting the ambit of "community": Protocol on Justice Departme Matters held before the King in Council at Sofiero on August 15, 1969; Sundberg, "Marriage or No Marriage: th Directives for the Revision of Swedish Family Law" (197 20 I.C.L.Q. 223. NORWAY: Law of May 20, 1927; for an account in English, see Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. II, p.306. FINLAND: The Finnish Legal System (1963).

16. BGB 1363 ff. (law of 18 June 1957, effective on 1 July 1958) (Zugewinngemeinschaft); Cohn, Manual of German La (2nd ed. 1968) Vol. I, s.515 ff.; Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. p.246; Kahn-Freund (1959) 22 M.L.R. 241, 254-257. A similar system has recently been introduced in Quebec: See the Civil Code Reform Commission: Report of the Matrimonial Regimes Committee, 1966; Statutes of Quebec 1969, c.77 (in force 1 July 1970).

17. Law of 14 June 1956 (in force 1 Jan. 1957); Les Régimes Matrimoniaux, Bibliothèque de la Faculte de Droit de l'Université Catholique de Louvain III (1966) p.247 ff; H.U. Jessurun d'Oliveira, "Pays-Bas" (1965) 17 Rev. Int de Droit Comparé 683; Ontario Law Reform Commission, Family Law Project, Property Subjects. Vol. II, p.279.

At the termination of the marriage the spouses share or "participate" in certain assets. Since the right to share is "deferred" until the end of the marriage, the term "community", which may imply the existence of a common fund of property, is somewhat misleading. All these systems are legal regimes, that is to say, they apply where the spouses have not agreed on a different (contractual)[18] regime, such as a regime of separate property. The spouses may also agree to vary the legal regime in certain respects. Our illustrations in the following paragraphs concentrate on the Danish, German and Dutch systems.

5.12 The systems differ as to the property which is shared at the end of the marriage. In Denmark and Holland, all the property of each spouse falls into the community, with the exception of certain personal rights and property acquired by gift or inheritance with a stipulation that it should remain outside the community.[19] In Germany, on the other hand, the right to participate in the community is a right to share the "surplus", that is, the increase in the value of the assets of each spouse during the marriage.

5.13 Although each spouse is free to administer his or her own property during the marriage there are provisions under all three systems to protect one spouse from abuse of power by the other. Some provisions are designed to protect a spouse's interest in the ultimate division of the community; for example, if the abuse of power has caused or risked a serious loss of assets, the other spouse may have a right to claim compensation, or to call for the community to be

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18. In countries with community of property it is often the case that the spouses may adopt by name a contractual regime the terms of which are laid down by law. In the absence of agreement the legal regime applies.

19. The spouses may, in general, agree to exclude certain property.

dissolved prematurely. Other provisions protect a spouse's present interests; for example, under Danish Law the matrimonial home and furniture cannot be sold or mortgaged by the owner spouse without the consent of the other spouse.[20]

5.14 The participation, or equalisation, is effected at the termination of the marriage by death, divorce or legal separation, or on earlier dissolution of the community on special grounds. The total assets of each spouse are then calculated. In Germany the value of pre-marriage property or gifts must also be calculated and deducted from the total of the spouse concerned; it is assumed that in the absence of an inventory of such property there is none to be deducted.[21]

5.15 In all three countries, the debts of a spouse are deducted in determining the total assets. In Holland, the spouses share liability for each other's debts. If a spouse's debts exceed his assets at the end of the marriage, he can call on the other spouse to contribute up to half the amount of the debts, as well as claiming a half share in the balance of the other spouse's assets.[22] In Denmark and Germany, on the other hand, an insolvent spouse cannot claim more than half the other spouse's net assets.[23] The difference is important only where one spouse is insolvent at the time of division. The sharing rules do not, of themselves in any of the above countries impose on a spouse direct liability to a third party for the other spouse's debts; however

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20. Pedersen (1965) 28 M.L.R. 137, 140-141.

21. BGB 1377.

22. Arts. 176, 183-188 B.W.; Les Régimes Matrimoniaux, pp. 256 ff., 260-261. There is a right to renounce altogether any interest in the community.

23. Germany: BGB 1375 I; Pedersen (1965) 28 M.L.R. 137, 140, 144-145.

such liability may arise out of the marriage relationship itself, in respect of certain household debts,[24] regardless of the property regime applicable to the parties.

5.16 In Denmark and Holland when the total net assets of each spouse have been calculated, the property is distributed equally between the spouses. A spouse may be able to claim certain specific articles in satisfaction of his or her share. For example, in Holland each spouse may keep his or her clothing and personal possessions at a value agreed or fixed independently. In Denmark, if both spouses want the same article on divorce, the claim of the spouse who originally acquired the article will, in general, be preferred, although the court has a discretion in respect of the home, the furniture and the family business.[25] If the value of an item of property awarded to a spouse exceeds that spouse's share, the court may order that spouse to pay the difference to the other. In practice, however, distribution on divorce is usually effected by private agreement. On death, the surviving spouse's claim to a specific item prevails over other beneficiaries.[26]

5.17 In Germany there is no distribution in specie. The spouse with the smaller net estate may claim from the other spouse an amount in cash sufficient to equalise the two net estates (i.e. the balance after deduction of debts, premarriage assets, gifts etc.). A spouse has no right to claim a specific asset from the other spouse in settlement of the

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24. Pedersen, at 140; see also Pedersen, "Recent Trends in Danish Family Law and their Historical Background" (1971) 20 I.C.L.Q. 332, 334; cf. the wife's presumed agency to contract household debts binding on the husband under English common law.

25. Pedersen (1965) 28 M.L.R. 137, 150-151.

26. Pedersen, at 151.

balance due except that,where in all the circumstances it is necessary to avoid hardship, the other spouse may be ordered to deliver specific property at a value to be fixed.

5.18 In certain instances there is power to depart from the principle of equal shares. On divorce, the Danish court may vary the shares where:

(a) the assets of the community have been acquired mainly by one of the spouses before marriage or by gift or inheritance during the marriage; and

(b) division into equal shares would be clearly unjust.[28]

But the court may not deprive a spouse of his half share of property acquired by the work and thrift of one or both spou during the marriage. Variation is intended to be used mainly in cases of short marriages. German law allows a spouse to refuse to pay a half share if equalisation would be grossly inequitable, for example, where the other spouse had failed to fulfil the financial obligations arising out of the marriage.[29]

5.19 Where the marriage ends in death the survivor's equalisation claim has to be considered in conjunction with rights of succession. For example, in Denmark the survivor has succession rights on intestacy, or legal rights of inher itance in the case of a will, in addition to his or her shar of the community. If the value of these rights, together

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27. BGB 1383.

28. Pedersen, at 147.

29. BGB 1381; Pedersen, at 148.

with any sums inherited and his or her separate property, is less than Kr.12,000 (about £ 660) the survivor is entitled to make up this amount from the estate.[30] If the other heirs are children, the survivor may take over the whole community estate for life, the distribution being postponed till the death of the survivor.[31]

5.20 In Germany, the position on death is completely different from that on divorce. On intestacy, there is no calculation of the community of surplus. The surviving spouse's interest under the intestacy is increased by a further quarter of the estate, whether or not there was a surplus owing from the deceased.[32] If there is a will, the survivor can elect against it and claim legal rights of inheritance.[33] In this case there is a calculation of the community of surplus and the balance owing to the survivor is added to the legal rights of inheritance.

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30. Pedersen, at 148.

31. Pedersen, at 148-149.

32. BGB 1371; Cohn, Manual of German Law, s.518.

33. The proportion due as legal rights of inheritance varies according to whether there are other heirs, and their relationship to the deceased.

(b) Ontario proposals

5.21 The present law of matrimonial property in Ontario is based on English law, i.e. separate property.[34] The Family Law Project of the Ontario Law Reform Commission have proposed that a new regime be introduced.[35] The new regime is not described as a community of property regime, because at no time does any property pass into community ownership by virtue of the marriage. It is defined as:[36]

> "a separation of property-type régime, subject to an equalizing claim payable in certain circumstances by one spouse or a spouse's estate to another, either on an application to the court or on the death of a spouse."

The regime described bears many points of similarity to the legal regimes of Scandinavia, Holland and Germany; if adopted it would have an effect comparable with the new Quebec regime.[37] It combines the two principles common to all those regimes: the freedom of the spouses to deal with their property independently during the marriage; and the ultimate sharing or equalisation of assets at the end of the marriage.

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34. Dower and curtesy still apply: Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. I, pp. 117 ff. and 157 ff.

35. Property Subjects, Vol. III, p.543 ff. (rev.). A final Report is due in 1971. The Royal Commission on the Status of Women in Canada recommended that upon dissolution of marriage each spouse should have the right to an equal share of the assets accumulated during marriage: see para.5.9 and n.12 above.

36. Property Subjects, Vol. III, p.546 (rev.).

37. See n.16 above.

(c) Israel: Spouses (Property Relations) Bill 1969[38]

5.22 In recent years the Israeli courts developed the concept that property acquired during marriage by the joint efforts of the spouses was presumed to belong to them in equal shares in the absence of evidence to the contrary. This concept is comparable with that of family assets which was developed in English law in cases such as Rimmer v. Rimmer but which has now been rejected by the House of Lords in Pettitt v. Pettitt and Gissing v. Gissing.[39] The Israeli development has been halted with regard to immovables by the Land Law, 1969. However, the Spouses(Property Relations) Bill, which was submitted to the Knesset in 1969, provides for a system similar to the deferred community systems outlined above. During the marriage,each spouse would have independent power to deal with his or her property, but at the termination of the marriage,whether by divorce or death, the spouse whose property was less than that of the other spouse would have an equalisation claim to half the difference.

3 PREVIOUS CONSIDERATION OF COMMUNITY OF PROPERTY IN ENGLAND

(a) The Morton Commission

5.23 The Morton Commission recognised "that marriage should be regarded as a partnership in which husband and wife work together as equals, and that the wife's contribution to the joint undertaking, in running the home and looking after the children, is just as valuable as that of the husband in providing the home and supporting the family". Despite this they

38. The following summary is taken from Yadin, "The Matrimonial Partnership (Matrimonial Property Relations) Bill, 1969" (1971) 6 Israel Law Review 106.

39. See paras. 1.36-1.37 above.

were divided on the question of community.[40] A majority of twelve rejected community except in relation to savings from the housekeeping.[41] Seven were in favour of some form of community: of these, one thought it should be limited to the contents of the home, three favoured community of the home and its contents, and three would have favoured the introduction of community generally.

5.24 The reasons given by those twelve members who were opposed to the introduction of community of property were as follows:[42]

(a) It would be too striking a departure from the traditional law and its unfamiliarity would be a handicap.

(b) It takes no account of the natural and normal desire in people to acquire property of their own; many people would be put to the trouble of taking steps to exclude it.

(c) It would be extremely complicated and much more difficult to operate than a system of separate property.

(d) The sum total of injustice would be far greater than under separate property; it would be unfair if a lazy spouse could claim a share in what the other had acquired by work and thrift.

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40. Royal Commission on Marriage and Divorce, Report 1951-1955, Cmd. 9678, paras. 644, 650-653, pp.175-178; Appendix III(2) pp.390-393 summarises community of property systems in the following countries: Southern Rhodesia; France; Norway; Louisiana. See also Kahn-Freund (1959) 22 M.L.R. 241, 242-247.

41. Para. 701; this recommendation was implemented by the Married Women's Property Act 1964.

42. Para. 651.

5.25 The three members of the Commission who supported the introduction of community of property as a general principle took a view directly opposite to that of the majority on two points.[43] First, they thought that community of property would introduce a much greater measure of fairness into married life, in that it would ensure that husband and wife shared equally in the profits and losses of the partnership. Secondly, they thought that the difficulties in the operation of community of property were exaggerated, and that a system similar to the Scandinavian ones could be made to operate satisfactorily. The German system of 1958 had not then been introduced, and was not considered.

5.26 The main reason given in support of the minority view in favour of community of property was as follows:[44]

> "A married woman may spend years of her life looking after and improving the home. Yet often the house and its furniture are the sole property of the husband and he may dispose of them without her consent or he may leave them by will to someone else. The woman may have been earning an independent livelihood before marriage and had she remained single could have set up her own home. If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own."

Despite improvements in the position of married women since 1956 this plea remains valid, and it is, indeed, the starting point of calls to reform the law of family property.

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43. Para. 653.

44. Para. 652.

(b) The Matrimonial Property Bill

5.27 On 24 January 1969 the House of Commons, by a majority of 86 to 32, gave a second reading to the Matrimonial Property Bill, the text of which is reproduced below.[45] The principle of the Bill was that on divorce, nullity or judicial separation (but apparently not on death) the spouses' property should be equally divisible between the spouses. Property owned before marriage, or acquired by gift or inheritance thereafter, would be excluded from sharing. The Bill was withdrawn before the Committee stage; it was accepted that it did not deal adequately with all the problems which would have to be solved if a community system were to be introduced.

4 PROPOSALS FOR A SYSTEM OF COMMUNITY OR SHARING OF ASSETS

5.28 Much of the pressure for reform of English family property law comes from the fact that a wife who has no earnings and no private means cannot acquire any property rights except such as her husband may choose to confer on her. A system of deferred community, such as those considered above, would overcome this by ensuring that at the termination of the marriage there would be a sharing of assets (and possibly liabilities) between the spouses, and would give practical effect to the view that marriage is a partnership. In this section, we consider how a system of community could be adapted to English law.[46]

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45. House of Commons Official Report, 24 January 1969, Vol. 776, cols. 801-896. The Bill was introduced by Mr Edward Bishop M.P. as a Private Member's Bill. See page 319 below, Appendix II.

46. Kahn-Freund, "Matrimonial Property - Some Recent Developments" (1959) 22 M.L.R. 241 discusses some aspects of applying a system of community of surplus in England.

5.29 Such a system would allow each spouse to deal with his or her property during marriage, while providing for sharing of assets on the termination of the marriage. The basic structure would be as follows:

(a) During the marriage, each spouse would be free to acquire and dispose of his or her own property, subject only to such restraints as are necessary to protect the other spouse and the family.

(b) At the termination of the marriage, or in other special circumstances, there would be a sharing of the spouses' assets.

(c) The principle of sharing would be that the spouse with less assets would have a money claim against the other spouse or his estate for an amount sufficient to equalise the value of the spouses' assets.

(a) Application of the system

5.30 Throughout the Paper we have applied the principle that, so far as is compatible with matrimonial obligations, spouses should be free to agree on their respective property rights.[47] In accordance with this principle, it is our view that if a system of community were introduced, the spouses should be free to contract out of the system by an agreement in writing. Additional safeguards, such as the requirement that the signatures be witnessed by a legal adviser, may be thought necessary for the protection of the weaker spouse; we leave this question

47. e.g. paras. 1.86 (contracting out of co-ownership), and 4.32 (renunciation of legal rights of inheritance).

open for further consideration. In principle the freedom to contract out or vary the system should continue throughout the marriage, so long as third party interests were not prejudiced.[48]

5.31 If a community system such as that which we have discussed were ever adopted, then, in our view, provided that the spouses did not contract out, it should apply to all marriages, including those in existence on the date when it came into force. Proper transitional provisions would be required to avoid possible unfairness in the case of existing marriages. The spouses would, of course, be able to contract out, but it might be necessary to go further, for example, by allowing either party unilaterally to exclude community during a prescribed period after the new law came into force. Besides transitional provisions there are many other problems which we do not consider at this stage, but which would have to be settled before a community system could be introduced. Among these are questions concerning the application of the system to peopl from abroad and to assets abroad.

(b) Separate powers

5.32 The system would not of itself directly impose any restriction on the power of each spouse to acquire, to dispose of or otherwise to deal with his or her property. In other words, during the marriage, each spouse would have independent and equal power as under separation of property. This general rule must, however, be subject to qualificatio Even under the present law there are certain restrictions o a spouse's power to deal freely with his or her assets. Fo example, the spouse who owns the matrimonial home can be prevented from dealing with it in such a way as to defeat the other spouse's rights of occupation. We have, in the

48. See below, para. 5.57 ff.

Paper, considered other proposals which would restrict a spouse's liberty to deal with the home and household goods, in the interests of the other spouse and the family. Restrictions of this kind would, in our view, remain essential, whether the present system continued or whether a system of community were introduced. The need for restraint arises from the mutual obligations of the spouses, not from any particular property system.

5.33 A different kind of restraint on the spouses' independent power arises from the community system itself. Under the principle of sharing, the spouse with less assets at the termination of the marriage would be entitled to claim half the difference between his assets and those of the other spouse. This potential equalisation claims carries a corresponding obligation on a spouse not to abuse his independent power by dealing with his property in a wasteful or reckless manner as a result of which his own assets might be substantially reduced. We shall consider the question of abuse of power later.[49]

(c) The property to be shared

(i) All the property of the spouses

5.34 A system under which all the property of both spouses was shared at the termination of the marriage would be the simplest to operate, since complicated accountancy and identification of funds would be avoided.[50] Such a rule might, however, be thought unfair, particularly where the marriage had been short, and one spouse had substantial assets before the marriage. It is true that where there were special circumstances the spouses could contract out.

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49. See below, para. 5.53 ff.

50. This is the general rule in Holland, and in Scandinavian countries, see above, para. 5.12.

Nevertheless, in our view, the case for introducing a system of community does not necessarily justify a principle under which property owned by the spouses before the marriage must be shared.

(ii) The family assets

5.35 Another way of defining the property to be shared would be to limit it to the "family assets". This term has been used in the Paper to refer to property in which, it seems reasonable to argue, both spouses should have some interest either because of the way in which it was acquired or because of the manner in which it is used.[51] Is it capable of a more precise definition? It has been suggested that family assets should be identified by reference to their purpose.[52] To many it would seem obvious that the matrimonial home and its contents should be regarded as a family asset. In some cases they would be the only substantial asset, but often they would be supplemented by other property. For example, savings or investments which are intended to be used for repairs, redecoration, replacement of furniture, or even for the purchase of a future home, would appear to be as much a family asset as the present home and its contents. But it would seldom be possible to decide which part of the spouses' savings or investments had been intended for such a purpose. Taking the matter a step further, if the income from a spouse's investments or the profits of a spouse's private business, were used by the family to pay their normal living expenses, could the investments or business be regarded as family assets? If so, then the term "family assets" seems capable of almost unlimited extension. If not, then if one

51. General Introduction, para. 0.24.

52. Kahn-Freund, Matrimonial Property: where do we go from here? (Josef Unger Memorial Lecture, University of Birmingham Faculty of Law, 1971) p.23: "I should ask: what object are they intended to serve? Are they assets for investment, acquired and held for the income they produce or the profit they may yield on resale? Or are they household assets, family assets, which form the basis of the life of husband, wife and children?"

spouse owned a home and the other owned investments of an equal value, the former would be shareable and the latter would not. For these reasons it does not seem practicable to attempt to define the property to be shared in terms of specific assets, such as the home and its contents, or in terms of property used for the benefit of the family.

(iii) The value of the assets acquired by the spouses' efforts during the marriage

5.36 In our view the assets to be shared at the termination of the marriage should represent, as far as possible, the property built up by the efforts of the spouses during the marriage. The simplest way of achieving this would be to adopt a rule similar to the German one, under which the value of property owned by a spouse before the marriage, or acquired thereafter by gift or inheritance, would be deducted from the value of the assets owned at the end of the marriage.[53] The balance would be the shareable property. Problems concerning valuation will be considered below.

5.37 To avoid the need to investigate the source of each item of property, German law has a further rule, under which it is presumed, unless the contrary is shown, that all the property of each spouse is shareable.[54] We would favour the adoption of a similar rule. It would make for simplicity and would encourage a spouse to waive deductions where the amounts involved were negligible, and to make a record of pre-marriage assets if he did not want them to be shared.

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53. BGB 1377, para.5.12 above. This principle is also proposed by the Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. III, pp. 549-550 (rev.); cf. Partnership Act 1890, s.44.

54. BGB 1377 II: there is provision for a joint inventory, in the absence of which it is assumed there are no deductions. In our view a spouse should be entitled to prove an allowable deduction even in the absence of an inventory.

5.38 The exclusion from sharing of property acquired by way of gift during the marriage should be limited to third party gifts, in our view. For example, if a husband bought a home and put it into joint names, it would obvious be inequitable for the wife to keep her share exclusively f herself at the end of the marriage and ask that the husband share be divided. A spouse should not be entitled to deduc the value of a gift received from the other spouse unless this had been agreed between the spouses. Since, in our vie the spouses should be free to contract out of the system altogether, they should also be free to agree to exclude an specific item of property from sharing, irrespective of whe it was a gift from one to the other. Formal safeguards mig be required for such an agreement,[55] and the interests of creditors should not be prejudiced.[56]

5.39 We make no specific proposals at this stage as to whether any other categories of property should be excluded from sharing. If a community system were introduced there are certain categories to which special attention might nee to be given, for example, damages for personal injuries. As far as personal chattels are concerned, since the system we envisage would involve the sharing of "values" rather th the redistribution of items of property, there would be no reason to exclude an item from valuation merely because it personal. If it had been acquired by gift or inheritance i value could be deducted from the assets of the spouse.

55. Para. 5.30 above.

56. See below, para. 5.57 ff.

(d) Specific applications of the sharing rules

5.40 In calculating the value of a spouse's assets it is of course the beneficial interest of a spouse which must be taken into account. If a spouse held property on trust for a third person that would be disregarded. But if the spouse had a beneficial interest in a trust, that would have to be valued and brought into account. The first problem, therefore, is to identify all property in which either spouse has a beneficial interest, and to determine the value of the interest. The effect of the community might well be to reduce the number of disputes as to the extent of each spouse's interest in a particular item, since the total value of the spouses' property (less any deductions) would be shared. We now consider how the sharing rules would apply in certain situations; those considered are by no means exhaustive.

(i) Property owned by a spouse at the date of the marriage

5.41 Earlier, we proposed that the value of property owned by a spouse before the marriage (or acquired thereafter by gift or inheritance) should be deducted from the value of the assets owned at the end of the marriage, and that the balance should be the shareable assets of that spouse.[57] The simplest way of doing this would be to calculate the net value of a spouse's assets at the date of the marriage, after deducting the value of any outstanding debts, and to deduct this amount from the value of the assets owned by that spouse at the time of the division. Although we favour this general rule, it might not in practice always lead to the expected result. For example, if one spouse owned a house worth £5,000 at the time of the marriage, and this house was the only substantial asset of that spouse throughout the marriage, then if it had increased in value to £7,000 at the end of the marriage, there would

57. Para. 5.36 above.

be in principle a balance of £2,000 to be shared between the spouses. However, in real terms the original owner of the house would have no more than at the date of the marriage.

5.42 The situation just described has led us to consider a possible exception, under which a specific asset could be excluded from sharing as such if it had been owned throughout the marriage. For example, if one spouse had owned a diamond brooch or a house before the marriage, that item would not be included in that spouse's assets on termination of the marriage. However, the exception itself could lead to further anomalies unless it could be confined to cases where no outstanding mortgage or other secured or unsecured debt had been incurred in connection with the property. Under the general rule proposed above the value of debts outstanding at the time of the marriage should be taken from the value of the pre-marriage property of a spouse. Taking the example of a house owned before marriage, if there had been an outstanding mortgage, the pre-marriage value of the house should be the spouse's equity in it at the date of the marriage. If there had been an unsecured debt, whether incurred in connection with the house or not, the amount of the debt should be deducted from the pre-marriage value of the home. But if the house itself were to be excluded from sharing on the basis that it had been owned throughout the marriage, it would difficult to decide how far the outstanding debt or mortgage should be taken into account. Our provisional view is that it would lead to great complication and uncertainty to introduce rules for excluding specific items of property owned throughout the marriage. The matter should be left to the agreement of the spouses.

(ii) Property acquired by gift or inheritance during the marriage

5.43 Property acquired by a spouse during the marriage by way of gift or inheritance should be assessed in a similar way to pre-marriage property, that is by taking its value at the date of receipt. It would be a question of fact in each case whether a particular gift had been to one spouse or both; this would, as now, depend on the intention of the donor.

(iii) Limited interests, insurances, pensions and annuities acquired during marriage

5.44 In principle, where a spouse has acquired during marriage an interest under an insurance policy, pension or annuity otherwise than by gift, the interest should be valued and included in that spouse's shareable property. It might sometimes be difficult to arrive at a valuation where the interest had not matured at the date of sharing; for example, the surrender value of an interest in a pension scheme could not always be readily calculated. Nevertheless some value would have to be estimated. Similar rules should apply to an interest under a settlement created by either spouse during the marriage or under a Married Women's Property Act policy (these are examples of gifts between spouses which remain shareable property).

5.45 As far as social security pensions are concerned, these could possibly be ignored, on the basis that the State has made provision for each spouse to get at least something, and that the contributions and payments are largely flat rate.[58] A different view might be taken of

58. For comment on the Swedish rules concerning pensions, see Sundberg, "Marriage or No Marriage: the Directives for the Revision of Swedish Family Law" (1971) 20 I.C.L.Q. 223, 227-8.

an earnings related scheme. We express no firm view at this stage; all these problems need detailed examination.

(iv) Limited interests and annuities owned before marriage or acquired by gift or inheritance

5.46 If a limited interest had been owned by a spouse before the marriage, or if it had been acquired by gift or inheritance during the marriage, valuation would present even greater problems, particularly in the case of discretionary trusts. The purpose of the valuation is to enable a deduction to be made from the final assets of a spouse, in order to arrive at the shareable assets. Our provisional view is that such interests should be ignored altogether; in other words, they should be excluded from the final assets and disregarded as a deduction, on the assumption that the spouse had no more at the end of the marriage than he or she had at the beginning (or date of the settlement).

(e) Debts

(i) Pre-marriage debts

5.47 There is no justification for imposing on one spouse liability for debts incurred by the other spouse before the date of the marriage. Under Scandinavian, German and French law neither spouse is liable to contribute to the pre-marriage debts of the other spouse,[59] and in our view this is the right solution. In practical terms, the value of the pre-marriage assets of a spouse should be calculated after deducting debts outstanding at that time. If the debts exceed the pre-marriage assets, the latter should be assessed as nil.

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59. Pedersen (1965) 28 M.L.R. 137, 144; BGB 1374 I; C.C. 1410.

(ii) Debts incurred during marriage

5.48 As a general rule, only the net assets of a spouse should be shared. All debts of a spouse outstanding at the time of the division should be deducted in order to find the net assets. There is a possible exception to this rule where a spouse had made dispositions or contracted debts in a manner prejudicial to the other spouse.[60] Since only money and assets which had not been spent or charged would remain to be shared, the effect would be that the spouses would "share" debts where each had a surplus of assets. For example, if a husband's final assets were £2,000 and he had outstanding debts of £800, his final shareable net assets would be £1,200.

5.49 A more difficult problem would arise where one spouse's debts exceeded his assets at the time of division. For example, if at the end of the marriage H owed debts of £1,000 and had no assets to meet them, and W had £2,000 net assets, could H require that W meet any part of this liability before the balance of her net assets was shared, or should his claim be limited to a half share of her assets? In the first case he would be entitled to £1,500 (£1,000 to meet the debts, and £500 as half the balance):[61] in the second he could claim only £1,000 (half W's net assets) all

60. See below, para. 5.53 ff.

61. These figures are calculated on the basis that W must pay the whole of the outstanding debt. An alternative would be to provide that W should pay ½ H's debt (£500) and share her balance; H would then be entitled to £1,250 from W (£500 + ½ £1,500). This can be compared with the Dutch law, para. 5.15 above.

of which would have to go towards his debts.[62] The first result is sometimes referred to as sharing "negative" estates, since H's debts are brought into the pool as a "minus" figure. The latter rule is sharing positive net estates, H's assets being estimated as nil.

5.50 The case for requiring a spouse not only to share his or her net assets with the other spouse, but also to make a contribution to the other spouse's debts is that some of the debts may have been incurred for the benefit of both spouses or of the family. If, for example, the assets were vested in one spouse, while the family liabilities had been undertaken in the name of the other, the absence of any rule concerning contribution would mean that on termination of the marriage a creditor would have recourse to no more than half the joint assets. It could be argued that, in principle, he might be better off than under the present law, since a creditor cannot normally have recourse to any of the assets of the debtor's spouse during or on termination of marriage. But if community is a partnership, is it fair to share only the profits and not the partnership debts? Further, may a spouse not be tempted to put assets in the name of the other spouse knowing that, if things go well, he can claim back half on termination of the marriage, but that if things go badly, his creditors can have recourse to no more than half? Not all such cases could be dealt with under section 42 of the Bankruptcy Act 1914.

62. This is the Scandinavian and German law, para. 5.15 above.

5.51 It seems that there are two possible solutions to this problem; they are not necessarily exclusive of each other. The first would be to introduce a principle of joint liability of husband and wife in respect of certain household and family debts. These debts would, in effect, be regarded as partnership debts, and each spouse would be liable to the creditors. The second solution would apply only at the time of sharing and would make both spouses contribute equally to the household or family debts outstanding at that time, irrespective of which spouse had contracted those debts. This would be a right of contribution between the spouses, but would not give the creditor of one spouse direct rights against the other spouse.

5.52 In order to avoid injustice to the spouses and to third parties some solution should be found to the problem of family debts. The task of defining such debts should not be insuperable, since they would, in principle, be the same as those for which a wife under the present law is presumed to have authority to pledge her husband's credit. Our provisional view is that the second solution outlined above would be fairer than a rule under which only positive net estates were shared. Nevertheless, we think that in due course the question of direct joint liability of the spouses for household debts should be considered in detail.

(f) Abuse of powers: right to claim sharing

5.53 It is a basic element of the community system under discussion that during the marriage each spouse should be free to deal with his or her property, subject only to such restraints as are necessary, even under a system of separate property, to protect the other spouse and family. It must, however, be recognised that independence during marriage, when coupled with the right to share on termination of the marriage, could increase the danger of abuse. A spouse

might, for example, squander his assets, or give them away, even to the point of insolvency, and then ask to share the other spouse's final assets.

(i) Compensation and setting aside

5.54 Several systems have provisions covering adverse dealings. Under German law, for example, the final or shareable assets of a spouse, called the "surplus", are deemed to include the amount by which the spouse had decreased his assets by any of the following means:[63]

(1) dispositions by way of gift, unless made in satisfaction of moral obligations;

(2) dissipation of assets;

(3) transactions intended to deprive the other spouse of benefits.

Only transactions made within the previous 10 years and without the consent of the other spouse are taken into account. The German rule can be illustrated by the following example: H has assets of £2,000 at the end of the marriage; during the marriage he has given away or squandered £4,000. His final shareable assets are therefore calculated as £6,000. Assuming the wife had no assets at the end of the marriage, she would prima facie be entitled to £3,000. This is subject to the rule that the other spouse's claim is limited to the assets actually available.[64] In the above example, only £2,000 is actually available, so this would be the extent of the wife's claim. The husband would be left with nothing.

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63. BGB 1375 II, III. Scandinavia and Holland have comparable rules to deal with abuse of power: Pedersen (1965) 28 M.L.R. 137, 141-142.

64. BGB 1378 II.

5.55 There is a further German rule under which a spouse, whose equalisation claim has not been satisfied because the other spouse's available assets are insufficient, is entitled to make up the deficit by claiming it directly from a third party to whom the other spouse has made a voluntary disposition with the intention of defeating the claim.[65] This rule can be compared with section 16 of the Matrimonial Proceedings and Property Act 1970, under which an application may be made to the court dealing with financial provision for an order restraining or setting aside certain transactions. The court has power to order repayment and transfer of property by a third person, other than a bona fide purchaser for value. It is clear that power for the court to investigate transactions, and if necessary to set them aside, would be essential under a system of community. Such a rule would impress upon spouses the duty to have regard to the interests of the other spouse and children. A rule similar to section 16 could be adapted for this purpose.

(ii) Right to claim a sharing

5.56 When the abuse of power by one spouse is a serious threat to the interests of the other spouse there is, in some countries, not only a right to compensation when the spouses' assets are shared at the end of the marriage, but also a right to apply for an earlier sharing.[66] It could be argued that any of the following situations should give a spouse the right to apply before the end of the marriage for the community (which up to then has been "deferred")

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65. BGB 1390 I.

66. e.g. Denmark, Germany and Holland: see Pedersen (1965) 28 M.L.R. 137, 141-142; BGB 1386.

to be implemented and the assets to be shared:

(a) Where the other spouse has wasted his assets in a way which puts the first spouse's equalisation claim in substantial jeopardy.

(b) Where the other spouse has abused his power by dealing with his assets in a manner inconsistent with his matrimonial obligations, e.g. by sale of the matrimonial home without consent.

(c) Where the other spouse has become bankrupt.

(d) Where the spouses have separated without prospect of reconciliation; in this case the application could be made by either spouse.

In our view, rules would be needed under which a spouse could apply for an earlier sharing in certain circumstances. Once there had been a sharing, the spouses would revert to separation of property and there would be no further sharing.

(g) Third parties: bankruptcy

5.57 Subject to what has been said about the possibility of imposing joint liability towards third parties in respect of certain household or family debts, the community system would not alter the position of third parties during the subsistence of the marriage. On termination of the marriage or upon earlier sharing, the claim of the creditors of one spouse would have priority over the equalisation claim of the other since only the balance left after deducting sufficient to meet outstanding debts would be shared between the spouses. A spouse's equalisation claim could increase the assets available to meet his debts.

5.58 We suggested above that if one spouse became bankrupt, the other spouse should have the right to call for a sharing of assets. The object of this is to protect his or her interest in future acquired assets. A spouse should not be obliged to apply, and if he did not then, in our view, neither the bankrupt spouse nor his trustee in bankruptcy should have the right to claim a premature sharing (except by agreement with the other spouse). In effect this would mean that if the husband became bankrupt the wife would be entitled to claim or to agree on a sharing of assets. If she did, the trustee in bankruptcy would take over the husband's equalisation claim. If she did not claim or agree to a division, neither the husband nor the trustee could apply for a sharing until the termination of the marriage or unless there were other special circumstances.[67]

5.59 Although a bankrupt spouse should not be allowed to call for a premature sharing of assets, he should not, on the other hand, be entitled to waive his possible future equalisation claim by agreement with the other spouse or otherwise, if this would prejudice his creditors. Such a waiver would be in effect a disposition in favour of the other spouse, and ought to come within the class of voluntary transfers which may be avoided under section 42 of the Bankruptcy Act 1914.

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67. See above, para. 5.56.

(h) Sharing of assets:

(i) General summary

5.60 The spouses' assets should be shared on the happening of any of the following events:

(a) Divorce;

(b) Judicial separation;

(c) Nullity;

(d) Death of one spouse;

(e) A successful application for an earlier sharing in certain cases;

(f) By agreement.

5.61 Each spouse's shareable assets should then be calculated as follows:

(a) His total assets should be valued.

(b) The value of any gifts or other dispositions made in abuse of power should be added.

(c) Outstanding debts should be deducted. In the case of any debts for which spouses shared responsibility, contribution could be claimed. This would affect the result only where the spouse who was liable to pay the third party had, or might have, a negative balance.

(d) The value of pre-marriage property and property acquired by gift or inheritance during the marriage should be deducted.

(e) The balance, if any, would be shareable.

Subject to what has been said about the claim for contribution to joint debts, a negative balance would not be taken into account. The spouse whose balance of shareable assets was less than that of the other spouse would be entitled to a balancing or equalisation claim to bring his share up to half the total assets of both spouses. Subject to provisions concerning the right to claim specific assets,[68] the claim would give rise to a money debt.

E X A M P L E

	H	W
Total assets on termination of marriage	£10,000	£1,000
Add: dispositions to 3rd parties	+ 2,500	
	£12,500	
Deduct: outstanding debts	- 2,000	- 500
	£10,500	£500
Deduct: pre-marriage property, gifts and property inherited from third parties	- 3,000	
	£7,500	£500
W has an equalisation claim to £3,500.....	- £3,500	+ £3,500
	£4,000	£4,000

68. Below, paras. 5.72-5.75.

(ii) Divorce, nullity or judicial separation

5.62 In proceedings for divorce, nullity or judicial separation either spouse should be entitled to apply for a sharing of assets. For this purpose, the final assets and debts would be valued as at the date of the final decree, though the right to apply might, with leave, be exercisable thereafter. If no application were made it would be assumed that each was content with the status quo, i.e. that no equalisation payment was needed in order to effect an equal sharing of their assets.

5.63 Should the court have power to vary the spouses' shares? Some countries provide for a limited power of variation.[69] In England the question of variation is closely linked to the court's power to award financial provision. On a decree of divorce, nullity or judicial separation, the court has wide powers to make any of the following orders in favour of a spouse or child of the family:[70]

(a) periodical payments, secured or unsecured;

(b) lump sum payments;

(c) transfers or settlements of any property of either spouse;

(d) variation of any ante-nuptial or post-nuptial settlement.

In exercising these powers the court must have regard, inter alia, to the means (including property) and needs of the parties, the length of the marriage, the contributions made

69. See para. 5.18 above.

70. Matrimonial Proceedings and Property Act 1970, ss.2-4; see Appendix III, p.323 below.

by each party to the welfare of the family, and the loss of any benefits such as a pension as a result of the divorce.[71] The court must exercise its powers "to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."[72]

5.64 These powers are far wider than those in the countries whose community systems we have considered in the Paper. Nevertheless, in our view they should not be abandoned if a system of community were introduced here. We envisage that in the majority of cases a spouse would apply for both a division of property and financial provision. The equalisation claim would be calculated (by agreement or by the court) before the court considered whether any order for financial provision should be made. In some cases, however, a spouse might not wish to claim equalisation, e.g. where there was no property, or where the assets of each spouse were equal. Failure to make an equalisation claim would not prevent a spouse from applying for financial provision: but, having elected not to claim, a spouse could not later claim equalisation, e.g. if dissatisfied with the order for family provision. In other cases a spouse might elect to apply for equalisation without asking for financial provision, e.g. where that spouse was largely to blame for the breakdown.

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71. s.5 (1).

72. Ibid.

5.65 To summarise, under the system we envisage, either spouse should be entitled to apply for a sharing of assets or for financial provision or for both. The time limit for applying would be the same. The court would exercise its powers to award financial provision in the light of the parties' financial position adjusted as a result of any order made on the equalisation claim. The principles on which the court's powers are at present exercised might have to be reconsidered in the light of the principles of sharing, but in general we envisage that the court would retain broad powers to order financial provision. In view of this, it would be unnecessary to consider introducing a general power to vary the spouses' shares, since the principles upon which such a power would be exercised would not vary materially from those now applied in assessing financial provision. For example, under its present powers the court can consider such things as the duration of the marriage and the contribution of each spouse to the welfare of the family. Where there was an application for a division independent of any other matrimonial proceedings it would have to be considered whether a special power of variation was required. We leave this question open.

(iii) Death

5.66 On the death of a spouse, the equalisation claim would affect the surviving spouse and the beneficiaries of the deceased under his will or intestacy. In contrast with the position where a marriage is ended by a decree, litigation between the parties would not normally be in progress, and every effort should be made to avoid it. Hence, the rules for sharing on the death of a spouse should be framed so as to allow the equalisation claim to be ascertained by the survivor and the personal representatives without resort to the court. There are certain special problems, which should be considered.

Balance owing by the survivor to the estate

5.67 In some cases the survivor's shareable assets may exceed those of the deceased. The Family Law Project of the Ontario Law Reform Commission has suggested that the survivor should never be called upon to make a balancing payment into the estate.[73] German law goes further and assumes that the survivor is always entitled to a fixed "equalisation" claim of one-quarter of the deceased's estate.[74] If no equalisation claim were allowed on behalf of the estate, the deceased would be deprived, by the accident of dying first, of bequeathing to his or her dependants or relatives (e.g. children of an earlier marriage) the amount which would have been due. The claims of dependants of the deceased for family provision from the estate would also be restricted to what the deceased actually owned at the time of death. On the other hand, looking at the matter from a practical point of view, if the deceased spouse died intestate, the survivor would in most cases receive the bulk of the estate; it seems pointless to consider whether the estate should be increased by means of a balancing claim against the survivor, when most of it is going to the survivor. The question of a balancing claim in favour of the estate is likely to be of practical importance only in those cases where the deceased made a will leaving substantial bequests to third parties. If, in such cases, the estate could make a balancing claim against the survivor the latter might have to surrender his or her assets for the benefit or a stranger. This would appear to be inconsistent with one of the general aims of the Paper - i.e. to ensure that a surviving spouse has a reasonable share of the family assets. It would apply the principle of sharing between spouses for the benefit of

73. Property Subjects, Vol. III, pp.560-561, 563 (rev.).

74. BGB 1371; Cohn, Manual of German Law, Vol. I, s.518. Only if the survivor claims legal rights of inheritance is the actual balancing claim calculated.

third parties. On balance, it is our provisional view that a survivor should not be required to make an equalisation payment into the estate.

Intestacy

5.68 The obligation of the estate to meet the survivor's equalisation claim should in principle be considered as an obligation independent of any rights the survivor may have on intestacy. The rules of intestate succession should, therefore, apply only to the balance of the estate. The present rules of intestate succession, framed in the absence of any system of community, give the surviving spouse an extensive interest in the estate of the deceased. It is clear that if a system of community were introduced in England, the rules of intestate succession would have to be reconsidered, in order to take into account the possible rights a survivor might have to an equalisation claim. It would, of course, be inconvenient to have different rules of intestacy according to whether the parties were governed by the community system or had contracted out. One simple solution would be to regard the survivor's share of the community assets as being in partial (or full) satisfaction of the rights due on intestacy. Another solution would be to provide that on an intestacy the survivor should have no equalisation claim, the intestacy rules being drawn in a way sufficiently favourable to the surviving spouse to cover any such claim. This matter, while requiring detailed consideration, does not really present any great difficulty.

Estate duty

5.69 Should the balance owed by the estate to the survivor be regarded as property passing on death? In our view, the equalisation of the spouses' assets on the termination of the marriage ought to be regarded as a property right, rather than as a right of succession. In other words, the beneficial interest of the spouse entitled to the equalisation should be considered to have been already in existence, in an inchoate form, though it could not be directly enforced. In accordance with this principle, our provisional view is that the amount due to the survivor should not be regarded as property passing on death.[75]

Family provision

5.70 Our provisional view is that even if a community system were introduced, it would be necessary to retain family provision law. The right of the survivor to apply for family provision from the estate is founded on the continuing obligation of each spouse to maintain the other, an obligation which is not necessarily brought to an end on the termination of the marriage by divorce or by death. The court should, in our view, retain its powers to order family provision for a surviving spouse. The number of applications might, of course, be reduced by the introduction of a community system, since a surviving spouse whose assets were less than those of the deceased would be entitled

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75. In Unhappy Families, the report of a Working Party set up by the Women's National Advisory Committee of the Conservative and Unionist Party, it was recommended that a lower rate of duty should apply between husband and wife (No.34, p.42), and that estate duty on the matrimonial home should be postponed during the life of the surviving spouse (No.35, p.42). See also H.C. Official Report, Vol.816, 4 May 1971, col.317, para. 1.63, n.138 above.

to make an equalisation claim. The surviving spouse should, in our view, be entitled to apply either for a sharing of assets or for family provision from the estate or for both.

Variation

5.71 Where a surviving spouse makes an equalisation claim against the estate, should there be any power to vary the amount due apart from the power to award family provision to the survivor? For example, if other dependants of the deceased apply for family provision should their claim be limited to the deceased's share of the joint assets, or should it be possible to reduce the survivor's share for their benefit? The survivor's equalisation claim would not normally exceed half the net assets,[76] so that the estate could never be reduced by more than half. It seems to us that the interest of the survivor in the equalisation claim should be regarded as a proprietary right which takes precedence over the deceased's obligations to other dependants. For this reason our view is that the survivor's equalisation claim should not be reduced when other dependants apply for family provision,[77] nor should there be any other power to vary the amount due to the survivor on the equalisation claim.

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76. Except where there had been a transaction in abuse of power, or where the deceased's estate was liable to contribute to any debts incurred by the survivor, the equalisation claim could not exceed 50% of the net estate.

77. This can be contrasted with our provisional view concerning legal rights: see paras. 4.67-4.68 above.

(j) Settling the claim: specific assets

(i) Division other than on death

5.72 In principle, the equalisation claim would not attach to any specific item but should be settled by a money payment. There might be cases where an immediate cash payment would cause hardship to the payer, for example, where the only substantial asset consisted of shares in a private company. In such cases the court should have power to order payment by instalments on whatever terms seemed reasonable, or by the creation of a charge or mortgage. The interests of both spouses should be considered. This power would be of particular importance in the case of an application for a division before the end of the marriage, as in this case the court's powers to order financial provision would not come into operation.

5.73 In other cases it might be in the interests of the payee spouse to have a specific item of property (for example, the matrimonial home) rather than a lump sum payment. The court already has power to transfer and settle the property of the spouses on a divorce, judicial separation or nullity.[78] The inter-relation of these powers and the power to allocate specific items in settlement of an equalisation claim would have to be considered; our provisional view is that similar principles should apply to each power. If the value of a specific asset allocated to a spouse exceeded the amount of that spouse's equalisation claim (and could not be independently justified under present powers) the court should have power to allocate on terms as to repayment of the balance by that spouse.

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78. Matrimonial Proceedings and Property Act 1970, ss. 4 and 5.

(ii) Death

5.74 For a community system to be workable, it should, as with legal rights, in most cases be possible for the equalisation claim to be settled between the survivor and the personal representatives without resort to the court. Although we have no considered the matter in detail, our provisional view is that if the deceased had made a specific bequest to the survivor, this should not be regarded as part of the amount due under the equalisation claim unless there were an express declaration to that effect.[79] the survivor should be entitled to take the bequest in addition to the equalisation payment. Unless the deceased gave instructions, the balance due to the survivor should be met by applying assets in the order laid down by the Administration of Estates Act 1925.[80] On intestacy there should not be any problems, since the survivor's rights would usually exceed the equalisation claim, if any such claim were allowed.[81]

5.75 It is our view that, as a general rule, the survivor should not be entitled as of right to any specific item forming part of the estate in preference to other beneficiaries. There are two possible exceptions. The first is that if the survivor already shared the beneficial interest in any property, he or she should be entitled to take that item in satisfaction of the equalisation claim. If the deceased's interest in that item exceeded the survivor's equalisation claim, the survivor should be entitled to pay the balance into the estate. The other exception would arise where the survivor made an application for family provision. The court would then have power to direct that the order for family

79. This can be contrasted with the rule we suggested for legal rights, para. 4.33 above.

80. First Schedule, Part II; this was suggested in connection with legal rights: above, para. 4.61.

81. See above, para. 5.68.

provision or the equalisation claim be met by the transfer of specific assets.

5 CONCLUSIONS AND SUMMARY

(a) General

5.76 The main advantage of a community system is that it would operate on fixed principles; the spouse with fewer assets would not have to depend on the court's discretionary power to obtain property rights on the termination of marriage. A community system would give practical effect to the proposition that marriage is a partnership, and should to some extent reduce disputes as to the ownership of property, by achieving equality of assets at the end of marriage.

5.77 On the other hand, a system which operates on fixed principles cannot take account of the special circumstances of each case. A community system might give an undeserved benefit to a spouse whose contribution to the marriage had been nil, and who had failed to fulfil his or her matrimonial obligations. Although it would not be essential for spouses to keep detailed records of their property transactions, the system might work unfairly to the disadvantage of a spouse who had not done so. A system of community would not replace the present laws of financial provision and family provision, which depend on discretionary factors. Nor would it eliminate, but might tend to increase, enquiries by the court into transactions which may prejudice a spouse's interest in the shareable assets.

(b) Relation between a community system and other matters considered

(i) Co-ownership of the matrimonial home

5.78 A system of co-ownership of the matrimonial home would be compatible either with a system of separate property, or with a system of community of property. One difference in effect between community and co-ownership would be that co-ownership would give the non-owner spouse an immediate interest in the home, whereas a community system of the type discussed would give the non-owner a deferred equalisation claim. Where the home was the only asset, co-ownership would have the effect of an immediate community.

5.79 Another difference between co-ownership and community would be that under co-ownership the spouses would share just one asset, whereas under community they would share the value of the assets acquired during the marriage. Where there were no substantial assets other than the home the effect would be similar, except that under co-ownership the sharing would be immediate and not delayed as under community. But where there were other assets a principle of sharing limited to just one asset could lead to anomalies (e.g. where one spouse owned assets of similar value which did not have to be shared). A wider principle of sharing might appear fairer in such cases, but would involve a more complicated and novel system of rules.

(ii) Occupation of the matrimonial home: use and enjoyment of the household goods

5.80 In parts 1 and 2 of the Paper we considered ways in which the law could protect the right of the non-owner spouse to occupy the matrimonial home and to retain the use of the household goods. The system of community we have discussed would not alter the ownership of property during the marriage, and would not eliminate the need for the

improved systems of protection which we have proposed.

(iii) Legal rights of inheritance

5.81 A system of legal rights was put forward as an alternative to a system of community of property as a means of sharing assets on the death of a spouse. There are several important differences: community would take into account the assets of both spouses acquired during the marriage, whereas legal rights of inheritance would operate on the deceased's estate, irrespective of when it was acquired, and would take no account of the survivor's assets (except, possibly, where they were derived from the deceased); the community system would leave the survivor with at least half the value of the assets acquired during the marriage, whereas legal rights would give the survivor a share of the deceased's estate which might leave him with more or less than half; community would operate on death and on divorce, whereas legal rights would operate only on death.

5.82 The above comparison may suggest that a community system would be fairer than a system of legal rights. However, if one considers the relative merits of each system as a measure to overcome disinheritance, the balance in favour of community is less strong. The community system would make it necessary to work out the equalisation claim whenever a marriage terminated in death and accordingly, to value the assets of both spouses. On the other hand, since the number of cases of disinheritance is small, legal rights of inheritance would be relied on in comparatively few cases; only one estate, that of the deceased, would need to be valued, and this would have to be done in any event.

(iv) Financial provision and family provision

5.83 We have already indicated that in our view a system of community of property could not at present replace the law of financial provision after a divorce, judicial separation or nullity, or the law of family provision, amended in accordance with our proposals. The community system would provide for the equalisation of the assets acquired during the marriage in accordance with fixed principles. The fact that the share received by a spouse would not be determined by reference to discretionary factors may be seen as the special advantage of community. But the amount due to a spouse on an equalisation claim may be more or less than would have been awarded as maintenance, and in cases in which the spouses had contracted out there would be no equalisation. As we have seen, the discretionary powers to award financial provision or family provision could operate so as to vary, in effect, the fixed rights of the community system.

(c) Conclusions

5.84 The system of community or sharing of assets which we have outlined in this part of the Paper is based on tentative views as to how such a system could operate in the fairest and simplest way possible in the light of present law and social attitudes. But such a system is inevitably complex, and many details would remain to be settled or varied in the light of consultation and comment. There are many practical arguments which could be put forward against a system of community. It would, as the Morton Commission pointed out, be an unfamiliar and novel concept in England. Many people might have to take legal advice at the time of marriage who would not now think of doing so. On the other hand it could be made to work, and it does work in other countries. In the last resort, the main question to be decided is whether it would lead to a greater measure of

justice to give effect to the idea that marriage is a partnership, by sharing the assets acquired during the marriage, regardless of which spouse contributed financially to their acquisition. This question cannot be avoided on the ground that community is too difficult.

5.85 There is, of course, a case for saying that discretionary powers are all that is needed when a marriage ends in divorce, nullity or judicial separation. But the relative advantages and disadvantages of a system of fixed shares, such as community, and a system of discretionary powers should not be considered only in legal terms. It is important not to forget the advantages of security and status which a community system would give to the spouse who, because of marital and family ties, is unable to acquire an interest in the assets by a financial contribution. Instead of being, as now, regarded as a dependant, who must apply to the court, such a spouse would become an equal partner in marriage, entitled at the end of the marriage to claim an equal share in the net assets acquired during the marriage. The pattern of social development in the future may be that on the end of a marriage an able-bodied spouse would be expected to become self-reliant and independent as soon as possible, rather than to look to the former marriage partner as a source of support for life. A system of sharing on fixed principles may be more in harmony with this idea than the present system of separate property, reinforced, in certain situations, by the enforcement, possibly over a long period, of maintenance obligations determined with regard to discretionary factors. These are matters on which many will have views, and we shall welcome them.

(d) Summary of proposals for a possible system of community

Basic pattern of the system (para. 5.29)

5.86 (i) During the marriage, each spouse would be free to acquire and dispose of his or her own property, subject only to such restraints as are necessary to protect the other spouse and the family.

(ii) At the termination of the marriage, or in other special circumstances, there would be a sharing of the spouses' assets.

(iii) The principle of sharing would be that the spouse with less assets would have a money claim against the other spouse or his estate for an amount sufficient to equalise the value of the spouses' assets.

Application of the system

(iv) The spouses should be free to agree that the system should not apply to their property. Unless they expressly agreed that it was not to apply, it should apply (para. 5.30).

(v) All the property of each spouse should be shareable, with the exception of property owned at the date of the marriage, property acquired by inheritance or by gift from a third party, and property which the spouses agreed to exclude from sharing (paras. 5.36-5.37).

(vi) It should be presumed that all the property owned by each spouse at the date of sharing was shareable property unless the contrary was proved (para. 5.37).

(vii) The value of property excluded from sharing should be deducted from the value of the assets of each spouse at the date of sharing to ascertain the value of the shareable assets. Certain special problems relating to valuation are discussed in paras. 5.40-5.46.

(viii) Neither spouse should be liable to contribute to the pre-marriage debts of the other spouse (para. 5.47).

(ix) Spouses should be entitled to deduct outstanding debts from the value of their shareable assets; a spouse whose debts exceeded his or her assets would be deemed to have no assets, and would not be entitled to claim more than half the other spouse's net assets except where there was a right to claim contribution from the other spouse in respect of an obligation which should be shared jointly (paras. 5.48-5.52).

(x) If a spouse abused his or her independent power to deal with property by entering into transactions not for value in a manner prejudicial to the other spouse's equalisation claim, the court should be empowered to add the value of property comprised in such transactions to that spouse's net assets in calculating the equalisation claim and, in certain circumstances, to avoid the transaction (paras. 5.54-5.55).

(xi) A spouse should be entitled to apply for a sharing of assets in certain circumstances: e.g. where the other spouse had wasted his assets, abused his powers or become bankrupt, or where the parties had separated without prospects of reconciliation (para. 5.56).

(xii) Either spouse should be entitled to apply for a sharing of assets whenever the court grants a decree of divorce, judicial separation or nullity (para. 5.60).

(xiii) Where the marriage terminates in the death of a spouse, only the survivor should be entitled to apply for a sharing of assets; no equalisation claim should be allowed on behalf of the deceased's estate (para. 5.67).

(xiv) Where the court grants a decree of divorce, judicial separation or nullity a spouse should be entitled to apply either for a sharing of assets or for financial provision or for both (para. 5.65).

(xv) Where the marriage terminates in death the survivor should be entitled to apply either for a sharing of assets or for family provision from the estate or for both (para. 5.70).

(xvi) Where the court grants a decree of divorce, nullity, or judicial separation, or where there was an application for a division of assets before the termination of the marriage, the court should have power to direct how the equalisation claim should be settled, and should have power to order transfers of specific assets from one spouse to the other in satisfaction of the claim (paras. 5.72-5.73).

(xvii) Where the marriage terminates in death, the survivor should not, in general, be entitled to claim any specific asset in satisfaction of the equalisation claim unless the survivor already had an interest in that asset; on a successful application for family provision the court should have power to deal with specific assets forming part of the estate (para. 5.75).

APPENDIX I

COMMUNITY SYSTEMS

1. General

See: W. Friedmann, ed., Matrimonial Property Law (1955); Les Régimes Matrimoniaux: Bibliothèque de la Faculté de Droit de l' Université Catholique de Louvain III (1966); Ontario Law Reform Commission, Study prepared by the Family Law Project, Property Subjects (1967); F.R. Crane and J. Levin, "The Rationalisation of Family Property Law" (1966) 9 J.S.P.T.L. 238.

For consideration of community by English courts see: De Nicols v. Curlier [1900] 2 Ch. 410, [1900] A.C. 21 (H.L.); Callwood v. Callwood [1960] A.C. 659 (P.C.); Re Bettinson's Question [1956] 1 Ch. 67.

2. Full Community

This term is used to describe systems in which the community, consisting of all movables and those immovables which were acquired during the marriage, is administered by the husband during the marriage. Under modern systems the husband's powers to deal with property are sometimes restricted, and the wife may be given power to deal with certain reserved funds. Among the countries with this type of system are Belgium, South Africa and, until recent reforms, France and Quebec.

FRANCE: Old law: W. Friedmann, ed. Matrimonial Property Law (1955), "France", by Marc Ancel, p. 3; Amos and Walton's Introduction to French Law (3rd ed. 1967) p. 253 ff; Ripert & Boulanger, Traité de Droit Civil, Tome IV (1959) p. 79 ff.

BELGIUM: Civil Code, Book III, 5: Les Régimes Matrimoniaux (1957) (this volume considers proposals for the reform of Belgian law, and compares them with current law and proposals for reform in France, Germany and Holland); Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. II, p. 198.

QUEBEC: W. Friedmann, ed., Matrimonial Property Law (1955) "Quebec", by H. Turgeon, p. 139 ff.; Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. II, p. 332 (covering old law and law reform proposals); Report of the Matrimonial Regimes Committee of the Civil Code Reform Commission (1966).

SOUTH AFRICA: Hahlo, The South African Law of Husband and Wife (3rd ed. 1969) pp. 208-282; W. Friedmann, ed., Matrimonial Property Law (1955) "South Africa", by T.W. Price, p. 188.

3. Community of gains

This term describes systems in which the community consists of property acquired during the marriage; property owned before marriage or acquired by gift or inheritance during the marriage remains separate property. The husband usually administers the community, though the wife may have power to deal with her own earnings as well as her separate property. Systems of this type, founded on Spanish law, apply in certain of the United States. A similar system was introduced in France in 1965.

CALIFORNIA: Family Law Act 1969.

LOUISIANA: W. Friedmann, ed., Matrimonial Property Law, (1955) "Lousiana", by Clarence J. Morrow, p. 29.

FRANCE: Law of 13 July 1965; Amos and Walton's Introduction French Law (3rd ed. 1967) p. 379; Mazeaud, Leçons de Droit Civil, Vol. 4, part 1, Régimes Matrimoniaux.

APPENDIX II

MATRIMONIAL PROPERTY BILL*

A

B I L L

T O

Amend the law of England and Wales in relation to the property rights of husband and wife; and for purposes connected therewith.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:-

Division of property

1. On the application at any time of either spouse the court may, and, whenever a petition for nullity of marriage, divorce or judicial separation is presented, the court shall, make a division of property between the spouses on the following principles -

(a) all property, or the replacement thereof, beneficially owned by either spouse at the time of the marriage or acquired by either spouse during the marriage by gift, devise, bequest or descent remains the separate property of that spouse, but all increase in the real value of such property during the subsistence of the marriage shall be matrimonial property and shall be equally divided between the spouses; and

* Introduced into the House of Commons as a Private Member's Bill by Mr. Edward Bishop, M.P., in November 1968. After being given a second reading by 86 votes to 32 on January 24, 1969 (House of Commons, Official Report, Vol. 776, cols. 801-896) the Bill was withdrawn before the Committee stage.

(b) subject to the provisions of section 6 below, all property, other than separate property the beneficial interest in which has been acquired by either spouse during the subsistence of the marriage, shall be matrimonial property and shall be equally divisible between the spouses.

Valuation and allocation

2. If the spouses are unable to agree on the value of any item of property, or in any case where the court deems just, the court may determine the value of such item and may also allocate particular items of property between the spouses, placing such value upon them as it thinks fit.

Insurance policies

3. In the application of section 1 of this Act the court shall take account of any policy of insurance on the life or for the endowment of either spouse the premiums for which have been paid by the spouses or either of them, and may make dispositions of such policies which shall be binding on any third parties affected by such orders, and may make orders as to the payment of future premiums; and the court may order that third parties be represented at the hearing.

Gifts to third parties

4. If either spouse makes in any one year to any person or persons, body or bodies any gift or gifts to a value exceeding the monthly income of the donor spouse without the consent of the other spouse, on the division of the matrimonial property there shall be deducted from the donor's share an amount equal to half the value of such gift or gifts.

Set off

5. Either spouse shall be entitled to require the inclusion in the value of the matrimonial property for the purposes of this Act of any consideration received to be set off against any matrimonial property disposed of by the other spouse without the previous consent of that spouse.

Exception to s. 1, and other powers of court.

6.— (1) Either party may show that a division of property between the spouses made in accordance with the principles of section 1 of this Act would be unreasonable in the particular circumstances, and the court may depart from those principles for good reason, which shall be stated, and may make such order as it thinks fit.

(2) The court may also order that the division of the matrimonial property be postponed, or make such interim or other orders as it thinks fit.

Amendment of 1965 c. 72

7. Section 34(1) of the Matrimonial Causes Act 1965 shall be amended by adding after paragraph (c) the following paragraph -

"(d) in any application for the division of matrimonial property under Matrimonial Property Act 1969", and

subsection (3) of that section shall be amended by leaving out paragraphs (a) and (b) and inserting the words "requiring the husband and the wife or either of them", and by leaving out all the words from "Act" to the end of the subsection.

Agreements to exclude equal division

8.— (1) The spouses may at any time before or during the marriage agree in writing that the above principles of equal division shall not apply in whole or in part to their matrimonial property:

Provided that each spouse shall be separately advised by a different solicitor of the effects of such agreement, and shall not sign such agreement in the presence of the other spouse or any close relative of the other spouse.

(2) The court shall have the power if it thinks just to disregard either wholly or in part any such agreement.

Explanatory information

9. When any person applies to marry in England and Wales he or she shall be informed in writing by or on behalf of the Registrar General of the rights of the parties in respect of matrimonial property.

Short title and extent

10.— (1) This Act may be cited as the Matrimonial Property Act 1969.

(2) This Act shall not extend to Scotland.

APPENDIX III

MATRIMONIAL PROCEEDINGS AND PROPERTY ACT 1970

PART I

Provisions with Respect to Ancillary and Other Relief in Matrimonial Causes and to Certain Other Matrimonial Proceedings

Maintenance pending suit in cases of divorce, etc.

1. On a petition for divorce, nullity of marriage or judicial separation, the court may order either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.

Powers of court in cases of divorce, etc., to make orders with respect to financial provision for parties to the marriage and children of the family

Financial provision for party to a marriage in cases of divorce, etc.

2.— (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of section 24(1) of this Act, make any one or more of the following orders, that is to say -

(a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;

(b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.

(2) Without prejudice to the generality of subsection (1)(c) above, an order under this section that a party to a marriage shall pay a lump sum to the other party -

(a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;

(b) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

Financial provision for child of the family in cases of divorce, etc.

3.— (1) Subject to the provisions of section 8 of this Act, in proceedings for divorce, nullity of marriage or judicial separation, the court may make any one or more of the orders mentioned in subsection (2) below -

(a) before or on granting the decree of divorce, of nullity of marriage or of judicial separation, as the case may be, or at any time thereafter;

(b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal.

(2) The orders referred to in subsection (1) above are -

(a) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments and for such term as may be so specified;

(b) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(c) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified.

(3) Without prejudice to the generality of subsection (2)(c) above, an order under this section for the payment of a lump sum to any person for the benefit of a child of the family, or to such a child, may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section to be met.

(4) An order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

(5) While the court has power to make an order in any proceedings by virtue of subsection (1)(a) above, it may exercise that power from time to time; and where the court makes an order by virtue of subsection (1)(b) above in relation to a child it may from time to time make a further order under this section in relation to him.

Orders for transfer and settlement of property and for variation of settlements in cases of divorce, etc.

4. On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of sections 8 and 24(1) of this Act, make any one or more of the following orders, that is to say -

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

(d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

and the court may make an order under paragraph (c) above notwithstanding that there are no children of the family.

Matters to which court is to have regard in deciding what orders to make under ss. 2, 3 and 4.

5.— (1) It shall be the duty of the court in deciding whether to exercise its powers under section 2 or 4 of this Act in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say -

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(2) Without prejudice to subsection (3) below, it shall be the duty of the court in deciding whether to exercise its powers under section 3 or 4 of this Act in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say -

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the standard of living enjoyed by the family before the breakdown of the marriage;

(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1) above, just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

(3) It shall be the duty of the court in deciding whether to exercise its powers under the said section 3 or 4 against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case) -

(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(c) to the liability of any other person to maintain the child.